89-1653

No. _____

In The

Supreme Court of the United States

October Term, 1989

KENNETH V. HEMMERLE,

Petitioner,

v.

BRAMALEA, INC., f/k/a
BRAMALEA DEVELOPMENT U.S., Ltd.,
a Delaware corp.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

KENNETH V. HEMMERLE
808 Northeast Third Avenue
Fort Lauderdale, Florida 33304
(305) 467-6801

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

In Case No. 87-3281, whether Petitioner was effectively denied his right to trial by jury (afforded by the Seventh Amendment to the United States Constitution), his due process rights and his equal protection rights (afforded by the Fourteenth Amendment to the United States Constitution) when:

(1) a Florida circuit court denied a motion for summary judgment against Petitioner on two separate occasions stating that there was a genuine issue of a material fact present;

(2) the same Florida circuit court subsequently granted a directed verdict against Petitioner, at trial, immediately after Petitioner presented the same evidence, stating that there was no evidence in the record which the jury could find for Petitioner;

(3) the Florida Fourth District Court of Appeal affirmed this decision per curiam without opinion; and

(4) the Florida Supreme Court stated it was without jurisdiction to review the petition and dismissed it?

In Case No. 88-1844, whether Petitioner was effectively denied his constitutional right to the separation of powers doctrine guaranteed by the United States Constitution when:

(1) the Florida legislature enacted section 45.061, Florida Statutes, concerning the appropriateness of assessing costs and attorney's fees against a party for rejection of an offer of settlement;

QUESTIONS PRESENTED – Continued

(2) a Florida circuit court assessed attorney's fees against Petitioner;

(3) the Florida Fourth District Court of Appeal affirmed that decision stating that section 45.061 was substantive;

(4) the Florida Supreme Court (in another case) stated that certain sections of section 45.061 "impinge upon this Court's duties in their *procedural* details"; and

(5) the Florida Supreme Court (in our case) declined to accept jurisdiction and dismissed the petition for review?

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JURISDICTION

The United States Supreme Court has jurisdiction to review Case No. 87-3281 and Case No. 88-1844 by writ of certiorari pursuant to 28 U.S.C. section 1257(3).

On October 18, 1989, the Florida Supreme Court stated that it was without jurisdiction to review Case No. 87-3281, and therefore, it dismissed the petition for review. The court stated that no motion for rehearing would be entertained by the court.

On January 18, 1990, the Florida Supreme Court declined to accept jurisdiction in Case No. 88-1844, and therefore, it dismissed the petition for review. The court also stated that no motion for rehearing would be entertained by the court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Seventh Amendment of the United States Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Fourteenth Amendment of the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 45.061, Florida Statutes:

(1) At any time more than 60 days after the service of a summons and complaint on a party but not less than 60 days (or 45 days if it is a counteroffer) before trial, any party may serve upon an adverse party a written offer, which offer shall not be filed with the court and shall be denominated as an offer under this section, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 45 days unless withdrawn sooner by a writing served on the offeree prior to acceptance by the offeree. An offer that is neither withdrawn nor accepted within 45 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude the making of a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this section.

(2) If, upon a motion by the offeror within 30 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including:

(a) Whether, upon specific request by the offeree, the offeror had unreasonably refused to furnish information which was necessary to evaluate the reasonableness of the offer.

(b) Whether the suit was in the nature of a "test-case," presenting questions of far-reaching importance affecting nonparties.

An offer shall be presumed to have been unreasonably rejected by a defendant if the judgment entered is at least 25 percent greater than the offer rejected, and an offer shall be presumed to have been unreasonably rejected by a plaintiff if the judgment entered is at least 25 percent less than the offer rejected. For the purposes of this section, the amount of the judgment shall be the total amount of money damages awarded plus the amount of costs and expenses reasonably incurred by the plaintiff or counter-plaintiff prior to the making of the offer for which recovery is provided by operation of other provisions of Florida law.

(3) In determining the amount of any sanction to be imposed under this section, the court shall award:

(a) The amount of the parties' costs and expenses, including reasonable attorneys' fees, investigative expenses, expert witness fees, and other expenses which relate to the preparation for trial, incurred after the making of the offer of settlement; and

(b) The statutory rate of interest that could have been earned at the prevailing statutory rate on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment.

The amount of any sanction imposed under this section against a plaintiff shall be set off against

any award to the plaintiff, and if such sanction is in an amount in excess of the award to the plaintiff, judgment shall be entered in favor of the defendant and against the plaintiff in the amount of the excess.

(4) This section shall not apply to any class action or shareholder derivative suit or to matters relating to dissolution of marriage, alimony, nonsupport, eminent domain, or child custody.

(5) Sanctions authorized under this section may be imposed notwithstanding any limitation on recovery of costs or expenses which may be provided by contract or in other provisions of Florida law. This section shall not be construed to waive the limits of sovereign immunity set forth in s. 768.28. eff. July 2, 1987.

28 U.S.C. Section 1257:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or

claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

STATEMENT OF THE CASE

The facts in Case No. 87-3281 are as follows:

On January 17, 1979, Petitioner entered into a contract for sale and purchase with Respondent. *Complaint*, Appendix A; *Initial Brief*, Appendix D. This contract essentially provided that Petitioner would sell and Respondent would purchase 180 acres of unimproved real property in South Palm Beach County for a price of $3,700,000. At this time, the property was involved in a foreclosure proceeding and a clerk's sale was scheduled for January 29, 1979. The contract for purchase and sale provided that Respondent would make available up to $2,300,000 to pay directly to John B. Dunkle, Clerk of the Court at the sale. Respondent placed a deposit of $100,000 with Petitioner's attorney, leaving a balance of $1,300,000 to be paid at the closing. Respondent purchased the property for $2,000,000 at the foreclosure sale and received a certificate of title from the clerk of the court on February 9, 1979. This agreement was amended to provide that Petitioner would receive the markup, which was the difference between $3,700,000 and the amount paid for the property by Respondent at the foreclosure sale.

On January 17, 1979, Petitioner and Respondent also entered into a joint venture agreement with respect to the development of the 180 acres. This agreement provided, among other things, that: (1) Respondent would consult with Petitioner and his partner, William D. Ryan in the development of the property; (2) Respondent would service a portion of the property [Parcel E] as reasonably practicable following its purchase of the land; (3) Petitioner-Ryan had an option to purchase Parcel E within sixty days following the completion of servicing, i.e., installation of roads and utilities for $33,000 per acre; (4) Petitioner-Ryan had rights of first refusal with respect to lots being offered for sale by Respondent; and (5) the parties would share in the profits realized through the development of the property.

On March 1, 1979, the parties amended the January 17, 1979 contract for sale and purchase agreement by agreeing that the land would only comprise 150 acres instead of 180 acres as originally contemplated. As a result of this adjustment in the overall acreage, the parties agreed to increase the per acre price of Parcel E as provided for in paragraph 5 of the January 17, 1979 agreement from $33,000 to $50,000 per acre.

On March 22, 1979, Petitioner and Respondent entered into another agreement, whereby Petitioner would assist Respondent in obtaining 124 acres of land [hereinafter Texaco Parcel] adjacent to the 150 acres described in the January 17, 1979 agreement. The agreement provided that if Respondent was successful in purchasing the property from Boca Del Mar Associates, a Texaco affiliate, then Respondent would pay Petitioner a fee of $100,000. Petitioner had an option to purchase the Texaco

Parcel which he assigned to Respondent. Respondent was successful in purchasing the property.

On October 12, 1979, the parties entered into another agreement which also amended the January 17, 1979 agreement, whereby the $100,000 fee Petitioner earned would be applied as a downpayment on Parcel E which reduced the purchase price of Parcel E by $100,000.

On October 16, 1979, at the request of Respondent, Petitioner released Respondent from any responsibility to pay Petitioner and William Ryan the $100,000 fee because that fee was paid by virtue of its application towards the purchase price of Parcel E under the January 17, 1979 agreement.

On March 13, 1980 and December 1, 1980, the parties amended the January 17, 1979 agreement with respect to how the property would be developed, how the profits would be divided and how the rights of first refusal in favor of Petitioner-Ryan would be treated. On February 4, 1981, in a handwritten agreement, the parties amended their agreements to delete Petitioner-Ryan's first right of refusal to purchase lots being offered for sale.

On February 4, 1981, in another handwritten agreement, the parties agreed that Petitioner-Ryan would release all of their rights, title or interest in the January 17, 1979 joint venture agreement as amended, their rights to share in the profits from development, and their rights to purchase any portion of the lands. Petitioner-Ryan further agreed to release any option rights which they had. In exchange for this release of rights, Respondent agreed to pay Petitioner-Ryan $1,000,000. Respondent orally agreed (through its Chairman, J. Richard Shiff, at the time

Mr. Shiff wrote the February 10, 1981 agreement) that Petitioner would also receive the $100,000 downpayment on Parcel E since the option rights were being released. Mr. Shiff further assured Petitioner that he would receive the interest on the $1,300,000 between February 10, 1979 and when the funds were released from escrow on or about June 1, 1979.

On March 2, 1981, a meeting took place in Fort Lauderdale between Petitioner and officials of Respondent including lawyers for Respondent. At this meeting an Indenture Agreement was signed amending the February 4, 1981 handwritten agreement whereby Respondent agreed to pay $100,000 to Petitioner-Ryan and $900,000 to Southern Atlantic Corporation at the direction of Petitioner-Ryan in exchange for Petitioner-Ryan releasing their rights in the Joint Venture Agreement dated January 17, 1979. At this meeting, J. Richard Shiff, the Chairman of Respondent, as an inducement to have Petitioner release his development rights in the property, stated and agreed orally that Petitioner would have the right to bid on the construction of homes on Parcel E and if he was the low bidder, he would be awarded the contract. Petitioner made it clear at the meeting to everyone that he wanted this right and at one point had refused to sign the Indenture Agreement unless Mr. Shiff agreed. Petitioner had designed the homes which were to be built by Respondent on Parcel E and was very familiar with the layout of the homes, the square footage of the homes and the type of construction materials to be used. Respondent purchased Petitioner's right, title and interest in and to the plans and specifications for the homes to be built on Parcel E. After the Indenture Agreement was signed on

March 2, 1981, Respondent never gave Petitioner notice that they were accepting bids to build on Parcel E. In April, 1982, Petitioner visited Respondent's project and was informed by Gordon Deson, an employee of Respondent, that bids were going to be accepted in the near future and that he would inform Petitioner. Respondent never did inform Petitioner.

On May 16, 1984, Petitioner filed a five count complaint against Respondent in the Florida court below. *Complaint*, Appendix A. Counts I and IV were for recision and fraudulent misrepresentation and alleged that in the latter part of February, 1981, Respondent falsely represented to Petitioner for the purpose of inducing Petitioner to execute the Indenture Agreement dated March 2, 1981 (wherein Petitioner released all of his interests in the January 17, 1979 Joint Venture Agreement, as amended), that Petitioner would be permitted to bid the improvements on Parcel E; and in the event that he was the low bidder, Petitioner would be given the general contract for the improvements. Petitioner alleged that he relied upon the false representation to his detriment.

In Count II, Petitioner brought an action for breach of contract for the interest which accrued on the $1,300,000 while those funds were held in escrow under the January 17, 1979 purchase and sale agreement as amended on January 29, 1979.

In Count III, Petitioner alleged that Respondent was unjustly enriched as a result of its failure to pay Petitioner the interest which accrued on the funds held in escrow after Respondent received the Clerk's Certificate of Title to the property.

In Count V, Petitioner alleged that Respondent breached the agreement to pay Petitioner a fee of $100,000 for assisting Respondent in acquiring the Texaco Parcel.

Respondent filed an answer on April 17, 1985, and an amended answer and affirmative defenses on June 28, 1985. *Amended Answer*, Appendix B.

Respondent moved for summary judgment on all counts of the complaint on December 10, 1986. Petitioner filed a response to the motion for summary judgment. The motion for summary judgment was denied on January 6, 1987. Respondent filed an amended answer on January 30, 1987. On July 8, 1987, Respondent renewed its motion for summary judgment. Petitioner responded to the renewed motion for summary judgment. The renewed motion for summary judgment was denied.

The matter was tried before a jury in the Florida circuit court between November 16, 1987 and November 23, 1987. Between November 16, 1987 and November 20, 1987, Petitioner put on his case in chief and in the evening of November 20, 1987 rested. Respondent moved for a directed verdict on all counts of Petitioner's complaint. Petitioner argued in response to the motion for directed verdict. Petitioner also submitted to the court a memorandum in opposition to the motion for directed verdict. *Memorandum of Law*, Appendix C. The circuit court received all of the case law submitted by the parties to the motion for directed verdict to read over the weekend.

The Florida circuit court erred in directing a verdict for Respondent on all counts of the complaint. Counts I

[Recision] and IV [Fraudulent Misrepresentation] of the complaint alleged that Petitioner was fraudulently induced to sign the March 2, 1981 Indenture Agreement releasing his development rights in the property upon Respondent's false representations that he would be awarded the construction contract on Parcel E if he was the low bidder. The Florida circuit court erroneously based its directed verdict as to Counts I and IV of the complaint on the decision of *Harrington v. Rutherford*, 38 Fla. 321, 21 So. 283 (1896), containing a statement to the effect that representations as to promises or future events do not in law constitute fraud. By this language, the Florida circuit court, the Florida Fourth District Court of Appeal, and the Florida Supreme Court essentially determined that Respondent's false representations to Petitioner (regarding the right to bid) was a promise to perform in the future and did not amount to fraud in the legal sense. This determination is contrary to the law in Florida for two reasons.

First, the *Harrington* decision is neither applicable nor controlling in our case. In *Harrington*, the plaintiff failed to plead fraud in the inducement. *Id.* at ___, 21 So. at 286 ("If such a case had been stated in the bill, a different question would be present . . . ."). In Case No. 87-3281, Petitioner clearly alleged fraud in the inducement.

Second, subsequent Florida courts have questioned and refined the *Harrington* decision. Moreover, it is interesting to note that the Defendants in *Ashland Oil, Inc. v. Pickard*, 269 So. 2d 714, 720 (Fla. 3d DCA 1972), like Respondent, relied upon *Harrington* for the proposition that representations as to promises or future events do not in law constitute fraud which the court flatly rejected.

The court in *Ashland Oil* stated: "We express the view that an action setting forth the elements of common law deceit, such as for fraud in the inducement, may be based on oral and written representations and these representations may be in the form of contractual promises or statements of present intention". *Id.* at 721; *Machado v. Foreign Trade, Inc.*, 478 So. 2d 405, 407 (Fla. 3d DCA 1986) (jury question as to whether acts complained of are fraudulent inducement; "compensatory and punitive damages are recoverable for fraud in the inducement and an action may be based upon oral or written representations in the form of contractual promises or statements of present intention.").

The Florida circuit court received all of the case law submitted by the parties. On Monday, November 23, 1987, the Florida circuit court entered a directed verdict in favor of Respondent as to all counts of Petitioner's Complaint. On December 1, 1987, the Florida circuit court entered a judgment on the directed verdict. Petitioner filed a motion for new trial which was denied on December 7, 1987.

The facts in Case No. 88-1844 are the same as in Case No. 87-3281. The issue in Case No. 88-1844 concerns attorney's fees in relation to section 45.061, Florida Statutes.

On November 24, 1987, Respondent filed a motion to tax attorney's fees pursuant to section 768.79, Florida Statutes and a motion to tax costs. *Initial Brief*, Appendix E. On December 1, 1987 the Florida circuit court entered an order setting the motions to tax attorney's fees and costs for Monday, April 4, 1988.

On Monday, April 4, 1988, the motions to tax attorney's fees and costs came on for hearing. At the hearing, counsel for Respondent advised the Florida circuit court that a mistake had been made and that the motion to tax attorney's fees should have been based upon section 45.061, Florida Statutes, rather than section 768.79. Petitioner objected as he was there prepared to argue that section 768.79 had no application to this case. On June 16, 1988, the Florida circuit court entered an order awarding attorney's fees in the amount of $40,813.75 and costs in the amount of $3,950.32 to Respondent pursuant to section 45.061.

ARGUMENT

The United States Supreme Court has jurisdiction to review a case from a state court in which either (1) the validity of a state statute is drawn into question on the ground of it being repugnant to the United States Constitution or (2) a right, privilege, or immunity is specifically set up or claimed under the United States Constitution. 28 U.S.C. section 1257(3).

Petitioner maintains that in Case No. 87-3281, he was denied his constitutional rights to trial by jury (afforded by the Seventh Amendment to the United States Constitution) and his due process rights and equal protection rights (afforded by the Fourteenth Amendment to the United States Constitution) when: (1) a Florida circuit court denied a motion for summary judgment against Petitioner on two separate occasions; (2) the Florida circuit court subsequently granted a directed verdict against

Petitioner, at the end of Petitioner's case-in-chief; (3) the Florida Fourth District Court of Appeal affirmed the decision per curiam without opinion; (*Order*, Appendix F) and (4) the Florida Supreme Court stated that it was without jurisdiction to review the petition. (*Order*, Appendix I)

Petitioner also maintains that in Case No. 88-1844, he was denied his constitutional rights to the separation of powers doctrine (guaranteed by the United States Constitution) when: (1) the Florida legislature enacted Section 45.061, Florida Statutes, concerning the appropriateness of assessing costs and attorney's fees; (2) a Florida circuit court assessed attorney's fees against Petitioner; (3) the Florida Fourth District Court of Appeal affirmed this decision and stated that Section 45.061 was "substantive"; (*Order*, Appendix J) (4) the Florida Supreme Court (in another case) stated that certain sections of 45.061 "impinge upon this Court's duties in their *procedural* details"; and (5) the Florida Supreme Court (in our case) declined to accept jurisdiction and dismissed the petition for review. (*Order*, Appendix M) Petitioner further maintains: (1) that he has sufficiently raised each of these federal questions in a sufficient and timely manner and (2) that the Florida Supreme Court by writ of certiorari decided impliedly on each of these federal questions. Hence, this Court has jurisdiction to review each case (Case No. 87-3281 and Case No. 88-1844) by writ of certiorari.

I. PETITIONER RAISED A FEDERAL QUESTION IN EACH CASE

It is essential that the petitioner raise a federal question in the state court before the United States Supreme

Court hears the case. *Green Bay & Miss. Canel Co. v. Patten Paper Co.*, 172 U.S. 58, 19 S. Ct. 97, 43 L. Ed. 364 (1898).

A. Manner of Raising Federal Question

A petitioner does not raise a sufficient federal question in a state court by merely alleging that a statute is in violation or contrary to the United States Constitution. *Herndon v. Georgia*, 295 U.S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 (1935) (federal question not sufficiently raised where petitioner alleged, *inter alia*, "that the statute was in violation 'of the Constitution of the United States'"); *Harding v. Illinois*, 196 U.S. 78, 25 S. Ct. 176, 49 L. Ed. 394 (1904) (federal question not sufficiently raised where petitioner alleged, *inter alia*, that "[t]he statute under which this action is prosecuted is contrary to the Constitution of the United States."). While no particular form of words or citation to a particular constitutional provision is necessary to raise the federal question, the petitioner must raise the federal question with fair precision. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 49 S. Ct. 61, 73 L. Ed. 184 (1928); *Copperweld Steel Co. v. Industrial Comm'n*, 324 U.S. 780, 65 S. Ct. 1006, 89 L. Ed. 1363 (1945) (federal question sufficiently raised where "petition did not mention the Amendment it [did] use[] the exact phraseology in which it is couched"); *Giles v. Teasley*, 193 U.S. 146, 24 S. Ct. 359, 48 L. Ed. 655 (1904) (" 'The right on which the party relies must have been called to the attention of the court in some proper way . . . .' ").

In our case, Petitioner sufficiently raised a federal question in the state court in each case. In Case No. 87-3281, in Petitioner's Motion for Rehearing, (*Motion*,

Appendix G), Petitioner sufficiently raised a federal question by stating that he was denied his right to trial by jury, his due process right, and his equal protection right.

> The Constitution of the United States declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. Moreover, the due process clause of the United States Constitution has been held to embrace equal protection of the laws. . . . The State and Federal Constitutions accord all persons equal rights before the law. . . . [Petitioner] has been effectively denied a trial of all the [Petitioner's] claims. . . . The [Petitioner] contends that where a party has submitted himself to the jurisdiction of the courts concerning the determination of his legal rights, he is guaranteed the privilege of having the merits of his cause adjudicated by the proper judicial tribunal, and where a jury trial is to be had, before an impartial jury. . . . As such, equal protection forbids unjust discrimination. Although the law may be fair on its face and impartial in appearance, if in its application and administration it unjustly and illegally discriminates between persons in similar circumstances in a manner so as to effect their material rights, there is a denial of equal justice which is prohibited by the Federal Constitution. It is a denial of equal protection of the law to make the execution of discretion dependent on the unbridled decision of the Trial Court to deny a jury verdict. . . . When the Trial Court removed this right from the province of the jury, it denied [Petitioner's] fundamental right. The concept "liberty" in the due process clause of the Fourteenth Amendment to the Federal Constitution embraces all the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . . No state shall make or enforce any law which shall abridge the

> privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. [quoting the Fourteenth Amendment]

In Case No. 88-1844, in Petitioner's Amended Motion for Rehearing (*Amended Motion*, Appendix K), Petitioner sufficiently raised a federal question by stating that he was denied his constitutional right to the separation of powers doctrine.

> In enacting section 45.061, the Florida Legislature has impermissibly encroached on a prerogative of the judiciary, an area in which the Legislature is forbidden to act. On its face, the express language of section 45.061 leaves no doubt that the statute is couched in mandatory terms and designed to induce or influence a party to settle litigation and obviate the necessity of trial.

In sum, therefore, Petitioner sufficiently raised a federal question in each case.

B. Time for Raising Federal Question

Federal law does not prescribe a specific time for raising a federal question in state court; a failure to raise a federal question in accordance with state law may constitute a waiver of that issue, thus precluding the United States Supreme Court from reviewing the case. *Stembridge v. Georgia*, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130 (1952) (federal question not timely raised since Georgia law required constitutional issues first be raised in trial court, while Petitioner raised question on motion for rehearing

in court of appeal). State law controls whether a federal question is raised in a timely manner. *Hartford Life Ins. Co. v. Johnson*, 249 U.S. 490, 39 S. Ct. 336, 63 L. Ed. 722 (1919). In Florida, a party may raise a federal question for the first time on appeal. *Marquette v. Hathaway*, 76 So. 2d 648, 652 (Fla. 1954); *Jefferson v. City of W. Palm Beach*, 233 So. 2d 206, 207 (Fla. 4th DCA 1970); *Board of Public Instruction v. Fidelity & Casualty*, 184 So. 2d 491, 494 (Fla. 2d DCA 1966); *Hillsborough County v. Bennett*, 167 So. 2d 800, 805 (Fla. 2d DCA 1964); *Pittman v. Roberts*, 122 So. 2d 333, 334 (Fla. 2d DCA 1960) ("The appellate court in the interest of justice may take notice of jurisdictional or fundamental error . . . whether or not it has been argued in the briefs or made the subject of an assignment of error, objection, or exception in the court below."). In our case, therefore, Petitioner timely raised the federal question in each case. In Case No. 87-3281, Petitioner raised the federal question in his motion for rehearing; in Case No. 88-1844, in his amended motion for rehearing.

II. THE FLORIDA SUPREME COURT PASSED/DECIDED UPON A FEDERAL QUESTION IN EACH CASE

In order for the United States Supreme Court to review a state court proceeding, the state court must actually pass or decide upon a federal question; the record must show expressly or impliedly (1) that the state court ruled on the federal question adversely to the appellant, and (2) that this decision was necessary to the determination of the case. *First Nat'l Bank v. Estherville*, 215 U.S. 341, 30 S. Ct. 152, 54 L. Ed. 223 (1910); *Kansas Endowment Assoc. v. Kansas*, 120 U.S. 103, 7 S. Ct. 499, 30

L. Ed. 593 (1887); *Sayward v. Denny*, 158 U.S. 180, 15 S. Ct. 777, 39 L. Ed. 941 (1895).

If the state court fails to issue an opinion (but merely affirms the decision without opinion) and if the state judgment rests solely on federal grounds (not on non-federal, adequate state grounds), then the United States Supreme Court may take jurisdiction. *Durley v. Mayo*, 351 U.S. 277, 76 S. Ct. 806, 100 L. Ed. 1178 (1956) (United States Supreme Court without jurisdiction where Florida Supreme Court's denial of petition without opinion could have rested on either of two adequate non-federal grounds); *Allen v. Arguimbau*, 198 U.S. 149, 25 S. Ct. 622, 49 L. Ed. 990 (1905) (United States Supreme Court will not take jurisdiction when Florida Supreme Court gave no opinion and judgment could have rested on either a federal question or on an adequate, non-federal question); *Stembridge v. Georgia*, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130 (1952). In our case, the United States Supreme Court has jurisdiction to review Case No. 87-3281 and Case No. 88-1844 because, in each case, the Florida Supreme Court impliedly decided upon a federal question when it merely dismissed the petition for review without opinion. *Order*, Appendix I; *Order*, Appendix M. There were not any adequate, non-federal grounds on which the Florida Supreme Court could have decided the cases. Nothing in the record suggests that the Florida Supreme Court decided or passed upon a non-federal question. Everything does suggest that the Florida Supreme Court did decide solely upon a federal question. *See Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 60 S. Ct. 676, 84 L. Ed 920 (1940) (where uncertainty as to state court's decision,

Supreme Court may vacate and remand case for clarification by state court).

III. THE UNITED STATES SUPREME COURT SHOULD GRANT CERTIORARI BECAUSE THERE ARE SPECIAL AND IMPORTANT REASONS THEREFORE

A review on a writ of certiorari is a matter of judicial discretion and the United States Supreme Court will grant certiorari only when there are special and important reasons therefore. Supreme Court Rule 17.1.

A. There Are Special and Important Reasons to Grant Certiorari in Case No. 87-3281

In the United States, the right to trial by jury is the birthright of every person, and it is a fundamental right in our democratic, judicial system. *Dimick v. Schiedt*, 293 U.S. 474, 55 S. Ct. 296, 79 L.(Ed. 603 (1935); *Baylis v. Travellers' Ins. Co.*, 113 U.S. 316, 5 S. Ct. 494, 28 L. Ed. 989 (1885). In 1791, when the United States Constitution was amended to include the Bill of Rights, the Seventh Amendment secured from general encroachment the right to trial by jury in all actions at common law where the value exceeded twenty dollars. This constitutional right cannot be made a nullity, obstructed, or impaired by judicial action. *Slocum v. New York Life Ins.*, 228 U.S. 364, 33 S. Ct. 523, 57 L. Ed. 879 (1913); *Lyon v. Mutual Benefit Health & Accident Ass'n*, 305 U.S. 484, 492, 59 S. Ct. 297, 300, 83 L. Ed. 303, 306 (1939) ("the right to trial by jury [must] be scrupulously safeguarded"). In our case, the Florida circuit court encroached upon Petitioner's right to

a jury trial when it erroneously granted a directed verdict against Petitioner after it previously denied granting two motions for summary judgment against Petitioner.

The United States Supreme Court will grant certiorari when state courts persistently deprive litigants of their right to a jury trial. *Rogers v. Missouri P.R. Co.*, 352 U.S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957) (Supreme Court granted certiorari where Missouri Supreme Court's reversal invaded the jury's function); *Jacobs v. City of New York*, 315 U.S. 752, 62 S. Ct. 854, 86 L. Ed. 1166 (1942) (dismissal of complaint at close of plaintiff's case was erroneous as depriving plaintiff of his right to a jury trial). "[T]his Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of [the right to a jury] determination." *Rogers*, 352 U.S. at 509, 77 S. Ct. at 450, 1 L. Ed. 2d at 500. In our case, like *Rogers*, the state court invaded the Petitioner's constitutional right to trial by jury in violation of the Seventh Amendment. It is a denial of equal protection and due process of law to allow any state circuit court to have unbridled discretion to deny a jury trial. Due process of law means that no one shall be personally bound until he has had his day in court.

In our case, a Florida circuit court denied Petitioner his constitutional right to a jury trial when it erroneously granted a directed verdict against Petitioner. On December 10, 1986, Respondent moved for a summary judgment against Petitioner. On January 6, 1987, the motion was denied. On July 8, 1987, Respondent renewed its motion for a summary judgment, and again the motion was denied. The case was tried before a jury between November 16 and November 23, 1987. At the end of Petitioner's case-in-chief, Respondent moved for a directed verdict on

all counts of Petitioner's Complaint. Petitioner argued in response to the motion for directed verdict. Petitioner also submitted to the Florida circuit court a memorandum in opposition to the motion for directed verdict. *Memorandum of Law,* Appendix C. The Florida circuit court received all of the case law submitted by the parties to the motion for directed verdict to read over the weekend. On Monday, November 23, 1987, the Florida circuit court entered a directed verdict in favor of Respondent as to all counts of Petitioner's Complaint. On December 1, 1987, the Florida circuit court entered a judgment on the directed verdict. Florida's Fourth District Court of Appeal affirmed this decision without opinion. *Order,* Appendix F. And the Florida Supreme Court dismissed the petition for review. *Order,* Appendix I.

In granting the directed verdict against Petitioner, the Florida circuit court deprived Petitioner his right to a jury trial. *Id.* at 504, 77 S. Ct. at 447, 1 L. Ed. 2d at 497 ("[t]he decision was exclusively for the jury to make"); *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520, 524 (1944) ("The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable."). There were conflicting inferences in our case, yet the circuit court overlooked the conflict and granted a directed verdict against Petitioner. *Jacobs,* 315 U.S. at 756, 62 S. Ct. at 856, 86 L. Ed. at 1168 ("without doubt the case is close and a jury might find either way. But that is no reason for a court to usurp the function of the jury.").

B. There Are Special and Important Reasons to Grant Certiorari in Case No. 88-1844

The Framers of our Constitution created a tripartite form of government because "the accumulation of all

powers, legislative, executive and judicial, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective may justly be pronounced the very definition of tyranny." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57, 102 S. Ct. 2858, 2864, 73 L. Ed. 2d 598, 604 (1982) (quoting *The Federalist No.* 47 300 (H. Lodge ed. 1888) (J. Madison)). Our tripartite form of government "provides structural, self-executing checks and balances which guard against the encroachment or aggrandizement of one branch at the expense of another." *United States v. Molina*, 688 F. Supp. 819, 821 (D. Conn. 1988).

It is generally held that the legislature does not inherently possess any judicial power, and therefore, the legislature may not usurp or encroach upon the powers of the judiciary. *Kilbourn v. Thompson*, 103 U.S. 168, 26 L. Ed. 377 (1880). Our tripartite form of government is sufficient to prohibit the legislature from assuming any judicial function. *James v. Appel*, 192 U.S. 129, 24 S. Ct. 222, 48 L. Ed. 377 (1904). In our case, Petitioner maintains that he was effectively denied his constitutional right to the separation of powers doctrine afforded by the United States Constitution when (1) the Florida legislature enacted section 45.061, Florida Statutes, (2) the Florida Fourth District Court of Appeal stated that section 45.061 was "substantive" and (3) the Florida Supreme Court (in another case) stated that certain sections of 45.061 "impinge upon this Court's duties in their *procedural* details."

"[Congress] cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. . . . [I]t cannot inquire into matters

that are exclusively the concern of the judiciary." *Barenblatt v. United States*, 360 U.S. 109, 112, 79 S. Ct. 1081, 1085, 3 L. Ed. 2d 1115, 1119 (1959). In our case, the Florida legislature did inquire into matters which were the exclusive province of the Florida judiciary. Two Florida courts have previously held either impliedly or expressly that section 45.061 was unconstitutional. In *The Florida Bar; Re: Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment)*, 550 So. 2d 442 (Fla. 1989), the Florida Supreme Court held that section "45.061 impinge[s] upon this Court's duties in their *procedural* details." (emphasis in original). In *McCormick v. Audi of America, Inc.*, Case No. 88-05903-CV (May 30, 1989), the Seventeenth Judicial Circuit Court, in and for Broward County, Florida, stated: "In enacting section 45.061, the Florida Legislature has impermissibly encroached on a prerogative of the judiciary, an area in which the Legislature is forbidden to act. . . . This Court finds Section 45.061 Florida Statutes, to be procedural. . . . Therefore, this Court must hold the statute unconstitutional, on its face." Therefore, by enacting section 45.061, the Florida legislature deprived Petitioner of his constitutional guarantee to the separation of powers doctrine afforded by the United States Constitution. *Florentine v. Barton*, 69 U.S. 210, 17 L. Ed. 783 (1876) (in determining whether a statute is invalid as a legislative assumption of judicial power, critical to note whether all judicial questions are left to courts).

The legislature violates the separation of powers doctrine in either of two ways: (1) "when one branch assumes a function that is more properly entrusted to another" or (2) "when one branch interferes impermissibly with the other's performance of its constitutionally

assigned duties." *United States v. Molina*, 688 F. Supp. 819, 822 (D. Conn. 1988) (tripartite form of government designed to prevent encroachment occasioned by unchecked accumulation of power). In our case, the Florida legislature violated the separation of powers doctrine, under the first instance, when it enacted section 45.061. By enacting section 45.061, the Florida legislature usurped a function of the judiciary: Since the statute affects the orderly practice, *procedure*, and administration of Florida courts (an area exclusively for the courts), the statute is unconstitutional since the Florida legislature impermissibly encroached on the province of the Florida courts. *Id.* at 823 ("Erosion of this principle of separation of powers will inevitably lead to an undermining of public confidence in the judiciary . . . .").

CONCLUSION

Based upon the authorities and arguments herein, Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari.

KENNETH V. HEMMERLE
808 Northeast Third Avenue
Fort Lauderdale, Florida 33304
(305) 467-6801

APPENDIX A

	IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA
KENNETH V. HEMMERLE Plaintiff, vs. BRAMALEA, INC., f/k/a BRAMALEA DEVELOPMENT U.S., LTD., a Delaware corp., Defendant.	CASE NO: COMPLAINT

COMES NOW, the Plaintiff, KENNETH V. HEMMERLE, (hereinafter HEMMERLE), and sues the Defendant, BRAMALEA, INC., f/k/a BRAMALEA DEVELOPMENT U.S., LTD., a Delaware corporation (hereinafter "BRAMALEA"), and says:

1. This is an action for damages in excess of FIVE THOUSAND DOLLARS ($5,000.00).

2. At all times material hereto, BRAMALEA was a Delaware corporation authorized to conduct business in the State of Florida.

3. At all times material hereto, HEMMERLE was a resident of Broward County, Florida, and is in all respects *sui juris*.

4. On or about January 17, 1979, HEMMERLE and BRAMALEA entered into a Contract for Sale and Purchase of approximately 180 acres of real property located and situate in Palm Beach County, Florida. A true and correct copy of said Contract is attached hereto as Exhibit "A".

5. On or about January 17, 1979, HEMMERLE and BRAMALEA entered into an agreement regarding the parties relative rights and obligations concerning the real property which was the subject of the aforesaid Contract for Sale and Purchase. A true and correct copy of said agreement is attached hereto as Exhibit "B".

6. On or about March 22, 1979, HEMMERLE and BRAMALEA entered into an agreement wherein HEMMERLE would assist BRAMALEA in obtaining approximately 124 acres of real property located and situated in Boca Raton, Florida. HEMMERLE was to receive One Hundred Thousand Dollars ($100,000.00) in consideration for his assistance. A true and correct copy of said Agreement is attached hereto as Exhibit "C".

7. The agreements attached hereto and labeled Exhibits "B" and "C" were subsequently amended by written instrument on or about January 29, 1979; October 12, 1979; March 13, 1980; December 1, 1980 and February 4, 1981. True and correct copies of the amendments dated March 1, 1979, March 13, 1980 and December 1, 1980 are attached hereto as Composite Exhibit "D". HEMMERLE is unable to locate copies of the remaining amendments at this time, but the same shall be submitted to the Court upon procurement.

8. On or about March 2, 1981, HEMMERLE and BRAMALEA entered into an Indenture wherein HEMMERLE assigned, released and quit-claimed to BRAMALEA any interest he had in the January 17, 1979 Agreement as amended, in consideration of One Hundred Thousand Dollars ($100,000.00). A true and correct copy of said Indenture is attached hereto as Exhibit "E".

9. HEMMERLE has complied with all conditions predecent required of him by the foregoing agreements.

COUNT I

RECISSION

10. HEMMERLE reaffirms and realleges Paragraphs 1 through 9 as though fully set forth herein.

11. In and about the latter part of February, 1981, BRAMALEA made certain false and fraudulent representations to HEMMERLE for the purpose of inducing HEMMERLE to execute the Indenture dated March 2, 1981, wherein HEMMERLE assigned, released and quit-claimed all interests he had in the agreement dated January 17, 1979, as amended. Said representations were that as partial consideration for the aforesaid Indenture, HEMMERLE would be permitted to bid the improvements on Parcel "E" and in the event the bid was competitive with other bidding contractors, HEMMERLE would be given the general contract for improvements.

12. Said representations were wholly and in every respect false, having been made by BRAMALEA with the positive intent to deceive and induce HEMMERLE to execute the Indenture and with the specific intent, at the

time made, not to fulfill its obligation to allow HEMMERLE to bid the improvements.

13. HEMMERLE placed his full confidence in the representations made to him by BRAMALEA and relied wholly on them.

14. Said representations were material and in reliance thereon, HEMMERLE entered into said Indenture wherein he assigned, released and quit-claimed any interest in the January 17, 1979 agreement as amended. Had it not been for such representations and his reliance thereon, HEMMERLE would not have entered into said Indenture.

15. BRAMALEA, in fact, failed and refused to permit HEMMERLE to bid the improvements.

16. HEMMERLE was not aware of the falsity of said representations, nor could he, by the exercise of reasonable diligence, have discovered the same at any time prior to that time when BRAMALEA failed and refused to permit him to bid the improvements.

17. HEMMERLE has communicated with BRAMALEA and has offered to rescind said Indenture in whole and has offered to restore to BRAMALEA everything that HEMMERLE has therfore received under and by virtue of said Indenture but the same has been refused.

18. HEMMERLE does hereby offer to rescind said Indenture in whole and to restore to BRAMALEA everything that HEMMERLE had received as ordered by this Court.

19. HEMMERLE has been damaged to the extent of the relinquishment of his rights under the January 17, 1979 agreement, as amended, and by the failure and refusal of BRAMALEA to permit him to bid the improvements and the resulting loss of the general contractor fees.

20. There is no full and adequate remedy at law. WHEREFORE, HEMMERLE demands judgment that the Indenture mentioned herein be delivered up and cancelled and that said Indenture be declared by this Court to be null and void and wholly ineffective for any purpose.

COUNT II

Breach of Contract

21. HEMMERLE reaffirms and realleges Paragraphs 1 through 9 as though fully set forth herein.

22. Pursuant to the Contract for Sale and Purchase, BRAMALEA would pay Three Million Seven Hundred Thousand Dollars ($3,700,000.00) for fee simple vested interest in certain real property which is the subject matter of the aforesaid Contract.

23. BRAMALEA was to pay HEMMERLE One Million Three Hundred Thousand Dollars ($1,300,000.00) at closing (Exhibit "A", Paragraph II[b]).

24. A portion of said real property was sold by the Clerk of the Palm Beach Court to BRAMALEA on or about June 1, 1979.

25. In addition to the sum of $1,300,000.00, the balance of $2,300,000.00 not paid to the Clerk of the Palm

Beach County Court, pursuant to said Paragraph II(b) of the aforesaid Contract, was to be placed in escrow with the law firm of KATCHER, SHARLIN and LANZETTA, attorneys for BRAMALEA.

26. As of the date of the aforesaid sale, (June 1, 1979), HEMMERLE was to receive interest, at prime, on all funds held by KATCHER, SHARLIN and LANZETTA.

27. The agreement between HEMMERLE and BRAMALEA that all such monies held in trust from June 1, 1979 would accrue to the benefit of HEMMERLE is further indicated in a letter dated June 8, 1979 from counsel for HEMMERLE to John A. Lanzetta, a true and correct copy of which is attached hereto as Exhibit "F".

28. HEMMERLE has complied in all respects with the Contract for Sale and Purchase including the parties' agreement that HEMMERLE would receive all interest, at prime, accrued on monies held in escrow by KATCHER, SHARLIN and LANZETTA.

29. Despite HEMMERLE'S compliance with all conditions precedent to his receiving said interest proceeds, said proceeds were given to BRAMALEA.

30. Despite HEMMERLE'S demand therefore, BRAMALEA has failed and refused to return said proceeds to HEMMERLE.

31. HEMMERLE has been damaged by BRAMALEA'S breach of the agreement that HEMMERLE would receive all accrued interest after June 1, 1979, in an amount in excess of One Hundred Twelve Thousand Four Hundred Sixty-Five and 16/100 Dollars ($112,465.16).

WHEREFORE, HEMMERLE demands judgment against BRAMALEA for damages in excess of $112,465.16 for prejudgment interest, costs and such other and further relief that this Court deems just and equitable.

COUNT III

Unjust Enrichment

32. HEMMERLE reaffirms and realleges paragraphs 1 through 9 and 22 through 31 as though fully set forth herein.

33. By virtue of BRAMALEA'S receipt of interest on all monies held in escrow by KATCHER, SHARLIN and LANZETTA, without returning said interest to HEMMERLE, BRAMALEA has received money that in equity it ought to refund to HEMMERLE.

34. BRAMALEA has been unjustly enriched as a result of their receipt of said interest proceeds and HEMMERLE has been damaged thereby.

WHEREFORE, HEMMERLE demands judgment against BRAMALEA for damages in excess of $112,465.16, for prejudgment interest, costs and such other and further relief that this Court deems just and equitable.

COUNT IV

Fraudulent Misrepresentation

35. HEMMERLE reaffirms and realleges Paragraphs 1 through 9 as though originally set forth herein.

36. In or about the latter part of February, 1981, BRAMALEA represented to HEMMERLE that if HEMMERLE would assign, release and quit-claim any interest he had in the January 17, 1979 agreement, as amended, BRAMALEA would permit HEMMERLE to bid the improvements on parcel "E" and in the event that HEMMERLE'S bid was competitive with other bidding contractors, HEMMERLE was assured he would be given the general contract for said improvements.

37. Said representations were wholly and in every respect false having been made by BRAMALEA with the positive intent to deceive and induce HEMMERLE to execute the Indenture and with the specific intent, at the time made, not to fulfill its obligation to allow HEMMERLE to bid the improvements.

38. HEMMERLE placed his full confidence in the representations made by BRAMALEA and relied wholly on them.

39. Said representations were material and in reliance thereon, HEMMERLE entered into said Indenture wherein he assigned, released and quit-claimed any interest in the January 17, 1979 agreement, as amended. Had it not been for such representations, and his reliance thereon, HEMMERLE would not have entered into the Indenture.

40. BRAMALEA, in fact, failed and refused to permit HEMMERLE to bid the improvements.

41. HEMMERLE was not aware of the falsity of said representations, nor could he, by the exercise of reasonable diligence, have discovered the same at any time

prior to that time when BRAMALEA failed and refused to permit him to bid the improvements.

42. HEMMERLE has been damaged by reason of the wilful [sic], false, fraudulent and deceitful representations made by BRAMALEA and by HEMMERLE'S reliance thereon to the extent of the relinquishment of his rights under the January 1, 1979 agreement as amended, and by the failure and refusal of BRAMALEA to permit him to bid the improvements and the resulting loss of the general contractor fees.

WHEREFORE, HEMMERLE demands judgment against BRAMALEA for compensatory damages in excess of ONE MILLION TWO HUNDRED THOUSAND DOLLARS ($1,200,000.00) for punitive damages, plus interest, costs and such other and further relief as this Court deems just and equitable.

COUNT V

Breach of Contract

43. HEMMERLE reaffirms and realleges Paragraphs 1 through 9 as though fully set forth herein.

44. Pursuant to the agreement dated March 2, 1981, HEMMERLE was to receive ONE HUNDRED THOUSAND DOLLARS ($100,000.00) from BRAMALEA in consideration for HEMMERLE'S assistance to BRAMALEA in obtaining approximately 124 acres of real property located in Boca Raton, Florida.

45. Despite HEMMERLE'S compliance with all conditions precedent in said agreement, and the fact that

BRAMALEA did thereby obtain ownership of said property, BRAMALEA failed and refused to pay HEMMERLE $100,000.00.

46. As a result of BRAMALEA'S breach of this agreement, HEMMERLE has suffered damages in the amount of $100,000.00.

WHEREFORE, HEMMERLE demands judgment against BRAMALEA for damages in the amount of $100,000.00 for prejudgment interest, plus costs and such other and further relief as this Court may deem just and equitable.

DATED this ___ day of ___, 1984.

_____

KENNETH V. HEMMERLE,
Plaintiff
808 N. E. 3rd Avenue
Fort Lauderdale, Florida 33308
305/467-6801

STATE OF FLORIDA

COUNTY OF BROWARD

BEFORE ME, the undersigned authority, personally appeared KENNETH V. HEMMERLE, who first being duly sworn, deposes and says that he is the Plaintiff named in the above and foregoing Complaint, that he has read the same, knows the contents thereof, and that the same is true and correct to the best of his knowledge and belief.

SWORN TO and subscribed before me this ___ day of May, 1984.

NOTARY PUBLIC

My Commission Expires:

APPENDIX B

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

KENNETH V. HEMMERLE,
Plaintiff,

CASE NO. 84-2796 CA(L)N

vs.

BRAMALEA, INC., etc.,
Defendant.
_____/

AMENDED ANSWER

Defendant, BRAMALEA, INC., files its Amended Answer as follows:

1. The allegations of the Complaint are denied.

2. Plaintiff's claim is barred by the doctrine of release.

3. Plaintiff's claim is barred by the doctrine of merger.

4. Plaintiff's claim is barred by the doctrines of estoppel and waiver, in that by Plaintiff's own conduct and failure to comply with his agreements, and his own failure to place bids as he alleges in his complaint, caused any damages he incurred.

5. Plaintiff is not entitled to equitable relief because of the doctrine of unclean hands.

6. Plaintiff's claim is barred by the statute of limitations.

7. Plaintiff has failed to satisfy conditions precedent to any breach of contract action in that he himself has failed to comply with his contracts, and failed to submit bids for improving the property, despite requests from BRAMALEA, INC.

8. Plaintiff's claim is barred by the doctrine of laches.

9. Plaintiff's claim is barred in whole or in part by his own contributory negligence.

10. Plaintiff's claim for punitive damages is barred because Plaintiff cannot and has not stated a claim for an independent tort, nor has he stated sufficient facts to justify the imposition of punitive damages.

11. Plaintiff is not the real party in interest, having assigned all of his rights, if any, to a third party.

12. Plaintiff's claims, in Counts I and IV, are barred by the statute of fraud.

WHEREFORE, Defendant moves the Court for an Order dismissing the Complaint, for costs, and further Defendant demands trial by jury.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 26th day of January, 1987 to KENNETH V. HEMMERLE, 808 NE Third Avenue, Ft. Lauderdale, Fl 33304.

Respectfully submitted,

PODHURST, ORSECK, PARKS,
JOSEFSBERG, EATON,
MEADOW & OLIN, P.A.
Suite 800,
City National Bank Building
25 West Flagler Street
Miami, Florida 33130
(305) 358-2800

By: _____
VICTOR M. DIAZ, JR.

BRAMA-AA/njd

APPENDIX C

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

KENNETH V. HEMMERLE, Plaintiff vs. BRAMALEA, INC., f/k/a BRAMALEA DEVELOPMENT U.S., LTD., a Delaware corp., Defendant.	CASE NO. 84-2796 CA(L)N

MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION FOR DIRECTED VERDICT

COMES NOW Plaintiff, KENNETH V. HEMMERLE and files this Memorandum of Law in Opposition to Defendant's Motion for Directed Verdict and states the following:

The Court in *Stenback v. Racing Associates Inc.*, 394 So. 2d 1128 (Fla. 4th DCA 1981) made the following statement regarding directed verdicts:

> It is well established that a directed verdict should be granted the defendant by the trial court at the close of plaintiff's case only when it is clearly apparent to the court that no evidence has been submitted on which the jury could lawfully find a verdict for the plaintiff and the conclusion reached by the trial judge under the circumstances is a conclusion of law resulting from the presence of a state of facts that permits no other legal result, MacAlpine v. Martin 205

So. 2d 347 (Fla.2d DCA 1967); Sun Life Insurance Co. of America v. Evans, 340 So. 2d 957 (Fla. 3d DCA 1976); Florida Rule of Civil Procedure 1.480, Florida Statutes Annotated, Volume 30.

In the case at bar Count I of the Complaint (Rescission) is based on the fact that Plaintiff was fraudulently induced to sign the March 2, 1981 Indenture with representations that he would be awarded the construction contract with the low bid. In a similar situation the Court in *Garasche v. Textured Coating of America*, 352 So.2d 1207 (Fla. 4th DCA 1978) stated that the trial court erred in directing a verdict for defendants since plaintiffs proved, for example, that they relied upon allegedly untrue statements in a brochure that came from the defendants and plaintiffs established that their reliance thereon was to their detriment and otherwise established a prima facia case against defendants.

Count IV of the Complaint (Fraud in The Inducement) is based upon the same fraudulent allegations contained in Count I. Whether fraud exists in a particular case is a question for the jury. *Haendel v. Paterno*, 388 So.2d 235 (Fla. 5th DCA 1980). Plaintiff is praying for punitive damages in this count based on defendants fraudulent conduct. "The overwhelming weight of authority in this state makes it clear that proof of fraud sufficient to support compensatory damages necessarily is sufficient to create a jury question regarding punitive damages. *First Interstate Development v. Ablanedo*, 511 So.2d 536 (Fla. 1987). The case law cited above clearly states why a directed verdict for the defendants would be erroneous in the case at bar.

The evidence presented has been sufficient to show Plaintiff's cost in building this project. The evidence of lost profits is clearly not speculative under the circumstances at bar. As in *Ashland Oil Inc. v. Pickard*, 269 So. 2d 714 (Fla. 3d DCA 1972) the cost to build the project plus the standard ten (10%) percent profit margin which is typical in the industry clearly is a reasonable basis for the lost profits. Also, as in *Ashland* the representations in the form of contractual promise or statements of present intention which were made by the Defendant clearly state a cause of action for fraud in the inducement and the ultimate decision as to their intentional or fraudulent nature rests with the jury.

Count II (Breach of Contract) and Count III (Unjust Enrichment) are based on the fact that interest on the $1,300,000.00 escrow fund was not paid to Plaintiff as agreed. In *Cradock v. Cooper*, 123 So. 2d 256 (Fla. 2nd DCA 1960) the court clearly stated that where money is placed in escrow for the purpose of satisfying obligations and the purchaser retained no control over these funds and had no right to their return under any circumstances that he had no legal title to the funds. In the case at bar it is clear that Plaintiff held legal title to these funds as they would have suffered the loss if the funds were lost. *Cradock* supra. Besides the evidence of breach of contract by Defendant taking the interest on these funds it is obvious as a matter of law that Plaintiff was entitled to the interest.

Plaintiff has alleged in Count V that Defendant failed to return the $100,000.00 fee earned on Bramalea's acquisition of the Texaco parcel. There is a factual issue presented by the evidence as to whether this sum was ever

paid. To take this issue or any of the issues brought up in the evidence away from the jury would be clear error. As the court stated in *Stenback v. Racing Associates Inc.*, 394 So. 2d 1128 (Fla. 4th DCA 1981) the direction of a verdict can constitute an encroachment on the right of a litigant to a jury trial and an invasion by the court of the province of a jury which is contrary to constitutional guaranties, where there is any evidence to justify a possible verdict for the non-moving party – even if a preponderance of the evidence appears to favor the movant." See Budgen v. Brady, 108 So.2d 672 (Fla. 1st DCA 1968).

Finally, a directed verdict may not be granted to Defendant at the close of Plaintiff's case where Defendant has entered in evidence because this would deny Plaintiff the rights to offer rebuttal. *Adhearn v. Florida Power and Light Co.*, 113 So.2d 751 (Fla. 2nd DCA 1959).

WHEREFORE, Plaintiff respectfully requests that Defendant's Motion for Directed Verdict be denied.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished counsel for the Defendant by hand delivery this 20th day of November, 1987.

KENNETH V. HEMMERLE, SR.
808 Northeast Third Avenue
Fort Lauderdale, Fla. 33304
Telephone: (305) 467-6801

APPENDIX D

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT

KENNETH V. HEMMERLE,

Appellant,

vs.

BRAMALEA, INC., f/k/a
BRAMALEA DEVELOPMENT U.S.,
LTD., a Deleware [sic] corp.,

Appellee.

_____/

CASE NO.
87-3281

APPELLANTS' INITIAL BRIEF
APPEAL FROM

The Circuit Court of the Fifteenth Judicial Circuit
of Florida in and for Palm Beach County

KENNETH V. HEMMERLE
808 Northeast Third Avenue
Fort Lauderdale, Florida 33304
Telephone: (305) 467-6801

PREFACE

Appellant, KENNETH V. HEMMERLE was the Plaintiff in the Court below. Appellee, BRAMALEA, INC., f/k/a BRAMALEA DEVELOPMENT U.S., LTD., a Delaware corp. was the Defendant.

This is an appeal from an order directing a verdict in a jury trial in favor of Appellee on all counts of Appellants complaint and the judgment thereon. (R. 2840).

In this Brief, the parties shall be referred to as they stood in the Court below. The symbol (T ___) will be

used to reference the trial transcript. The symbol (R ___) will be used to reference the Record. The symbol (A ___) will be used to reference the Appendix. Exhibits entered into evidence will be designated as either Plaintiff's or Defendant's.

All emphasis appearing in this Brief shall be that of the author, unless otherwise noted.

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CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

On January 17, 1979, Appellant KENNETH V. HEMMERLE, (HEMMERLE), entered into a Contract for Sale and Purchase with Appellee, BRAMALEA, INC., f/k/a BRAMALEA DEVELOPMENT U.S. LTD., (BRAMALEA). (Plaintiff's Exhibit 60, T.912-914, R. 1439). This contract essentially provided that HEMMERLE would sell and BRAMALEA would purchase 180 acres of unimproved real property in South Palm Beach County for a price of $3,700,000.00 (Plaintiff's Exhibit 60). The property was at this time, involved in a foreclosure proceeding and a Clerk's Sale was scheduled for January 29, 1979. (T. 238). The contract for purchase and sale further provided that BRAMALEA would make available up to $2,300,000.00 to pay directly to John B. Dunkle, Clerk of the Court at the sale. (Plaintiff's Exhibit 60). A deposit of $100,000.00 had been placed with the seller's attorney, Jack A. Jansen, leaving a balance of $1,300,000.00 to be paid at closing (Plaintiff's Exhibit 60). BRAMALEA purchased the property for 2 million at the foreclosure sale and received a certificate of title from the Clerk of the Court on February 9, 1979. (T. 236, 921), Plaintiff's Exhibit 59, (T.1195-1196). This agreement was amended to provide that HEMMERLE shall receive the markup, which is the difference between $3,700,000.00 and the amount spent for the property by BRAMALEA at the foreclosure sale. See Exhibit C to BRAMALEA'S Motion for Summary Judgment filed December 10, 1986. (R. 1668-1724).

On January 17, 1979, HEMMERLE and BRAMALEA entered into a joint venture agreement with respect to the development of the 180 acres. (Plaintiff's Exhibit 2). This

agreement provided, among other things, that, 1) BRAMALEA would consult with HEMMERLE and his partner, William D. Ryan (H-R) in the development of the property; 2) that BRAMALEA would service a portion of the property (Parcel E) as reasonably practicable following its purchase of the land; (Plaintiff's Exhibit 2); 3) that H-R had an option to purchase Parcel E within 60 days following the completion of servicing, i.e., installation of roads and utilities for $33,000 per acre; 4) that H-R had rights of first refusal with respect to lots being offered for sale by BRAMALEA; and 5) that the parties would share in the profits realized through the development of the property. (Plaintiff's Exhibit 2).

On March 1, 1979, the parties amended the January 17, 1979 agreement by agreeing that the land only comprised 150 acres instead of 180 acres as originally contemplated. (Plaintiff's Exhibit B). As a result of this adjustment in the overall acreage, the parties agreed to increase the per acre price of Parcel E as provided for in paragraph 5 of the January 17, 1979 agreement from $33,000.00 to $50,000.00 per acre. (Plaintiff's Exhibit 8) (T. 926).

On March 22, 1979, HEMMERLE and BRAMALEA entered into another agreement whereby HEMMERLE would assist BRAMALEA in obtaining 124 acres of land adjacent to the 150 acres described in the January 17, 1979 agreement. (Plaintiff's Exhibit 12) (T. 928, 939-944). This 124 acre parcel will be referred to as the "Texaco Parcel". The agreement provided that if BRAMALEA was successful in purchasing the property from Boca Del Mar Associates, a Texaco affiliate, then BRAMALEA would pay HEMMERLE a fee of $100,000.00. (Plaintiff's Exhibit 8) (T.

942). HEMMERLE had an option to purchase the Texaco Parcel which he assigned to BRAMALEA. (T. 940). BRAMALEA was successful in purchaseing [sic] the property. (T. 942).

On October 12, 1979, the parties entered into another agreement which also amended the January 17, 1979 agreement, whereby the $100,000.00 fee HEMMERLE earned for insuring that BRAMALEA acquired the Texaco Parcel would be applied as a downpayment on Parcel E which reduced the purchase price of Parcel E by $100,000.00 (Plaintiff's Exhibit 9).

On October 16, 1979 at the request of BRAMALEA, HEMMERLE released BRAMALEA from any responsibility to pay HEMMERLE and William Ryan the $100,000.00 fee because that fee was paid by virtue of its application towards the purchase price of Parcel E under the January 17, 1979 agreement. (Plaintiff's Exhibit 83) (T. 1069).

On March 13, 1980 and December 1, 1980, the parties amended the January 17, 1979 agreement with respect to how the property would be developed, how the profits would be divided and how the rights of first refusal in favor of H-R would be treated. (Plaintiff's Exhibits 38 and 65). On February 4, 1981 in a handwritten agreement, the parties amended their agreements to delete H-R's first right to purchase lots being offered for sale. Plaintiff's Exhibit 84.

On February 4, 1981 in another handwritten agreement the parties agreed that H-R would release all of their right, title or interest in the January 17, 1979 joint venture agreement as amended, their rights to share in

the profits from development, and their rights to purchase any portion of the lands. (Plaintiff's Exhibit 61) (T. 265-268). H-R further agreed to release any option rights which they had. (Plaintiff's Exhibit 61). In exchange for these release of rights, BRAMALEA agreed to pay H-R $1,000,000.00. It was further orally agreed by BRAMALEA through its Chairman, J. Richard Shiff, at the time Mr. Shiff wrote the February 10, 1981 agreement that HEMMERLE would also receive the $100,000.00 downpayment on Parcel E since the option rights were being released. (T. 614-616, T. 1423, 1424) Mr. Shiff further assured HEMMERLE that he would receive the interest on the 1.3 million between February 10, 1979 and when the funds were released from escrow on or about June 1, 1979. (T. 614-616, T. 1200, 1423, 1424).

On March 2, 1981, a meeting took place in Fort Lauderdale between HEMMERLE and Officials of BRAMALEA including lawyers for BRAMALEA. (T. 357-358). At this meeting an Indenture Agreement was signed amending the February 4, 1981 handwritten agreement whereby BRAMALEA agreed to pay $100,000.00 to H-R and $900,000.00 to Southern Atlantic Corporation at the direction of H-R in exchange for H-R releasing its rights in the Joint Venture Agreement dated January 17, 1979 (T. 357-321). At this meeting J. Richard Shiff, the Chairman of BRAMALEA, as an inducement to have HEMMERLE release his development rights in the property stated and agreed orally that HEMMERLE would have the right to bid on the construction of homes on Parcel E and if he was the low bidder, he would be awarded the contract (T. 359, 360-364, 370, 373, 375, 377, 429, 433, 446, 450, 456). HEMMERLE made it clear at the meeting to everyone

that he wanted this right and at one point had refused to sign the Indenture Agreement unless Mr. Shiff agreed. (T. 359, 451, 456). HEMMERLE had designed the homes which were to be built by BRAMALEA on Parcel E through Eugene Smith, an architect in Tampa, Florida and was very familiar with the layout of the homes, the square footage of the homes and the type of construction materials to be used. (T. 1000). BRAMALEA purchased HEMMERLE'S right, title and interest in and to the Eugene Smith plans and specifications for the homes to be built on Parcel E. (T. 932). After the Indenture Agreement was signed on March 2, 1981, BRAMALEA never gave HEMMERLE notice that they were accepting bids to build on Parcel E. (T. 971, 797, 1151-1152). In April, 1982 HEMMERLE visited BRAMALEA'S project and was informed by Gordon Deson, an employee of BRAMALEA that bids were going to be accepted in the near future and that he would inform HEMMERLE. (T. 974)

On May 16, 1984 HEMMERLE filed a five count complaint against BRAMALEA in the court below. (R. 1439-1477). Counts I and IV were for recission [sic] and fraudulent misrepresentation and alleged that in and about the latter part of February, 1981 BRAMALEA falsely represented to HEMMERLE for the purpose of inducing HEMMERLE to execute the Indenture Agreement dated March 2, 1981, wherein HEMMERLE released all of his interests in the January 17, 1979 Joint Venture Agreement, as amended, that HEMMERLE would be permitted to bid the improvements on Parcel E and in the event that he was the low bidder, HEMMERLE would be given the general contract for the improvements. (R.

1439-1446). HEMMERLE alleged that he relied upon the false representation to his detriment (R. 1439-1446.

In Count II HEMMERLE brought an action for Breach of Contract for the interest which accrued on the 1.3 million dollars while those funds were held in escrow by KATCHER, SHARLIN and LANZETTA, (Attorneys for BRAMALEA) under the January 17, 1979 Purchase and Sale Agreement as amended on January 29, 1979, after February 10, 1979, the date BRAMALEA received a Clerk's Certificate of Title. (R. 1442-1444).

Counts III of HEMMERLE'S complaint alleged that BRAMALEA was unjustly enriched as a result of their failure to pay HEMMERLE the interest which accrued on the funds held in escrow after BRAMALEA received the Clerk's Certificate of Title to the property. (R. 1443-1444).

Count V of the complaint alleged that BRAMALEA breached the agreement to pay HEMMERLE a fee of $100,000.00 for assisting BRAMALEA in acquiring the Texaco Parcel. (R. 1445-1446). BRAMALEA filed an answer on April 17, 1985, (R. 1550-1551), and an amended answer and affirmative defenses on June 28, 1985 (R. 1559-1560). BRAMALEA moved for Summary Judgment on all counts of the complaint on December 10, 1986. (R. 1668-1724). HEMMERLE filed a response to the Motion for Summary Judgment. (R. 1725-1774). The Motion for Summary Judgment was denied on January 6, 1987. (R. 2052). BRAMALEA filed an amended answer on January 30, 1987. (R. 2113-2114) On July 8, 1987, BRAMALEA renewed its Motion for Summary Judgment. (R.

2146-2198). HEMMERLE responded to the renewed Motion for Summary Judgment. (R. 2199-2249). The motion was denied.

The matter was tried before a jury in the court below between November 16, 1987 and November 23, 1987. (T. 1438). Between November 16, 1987 and November 20, 1987, HEMMERLE put on his case in chief and in the evening of November 20, 1987 rested. (45-1294). BRAMALEA moved for a directed verdict on all counts of HEMMERLE'S complaint. (T. 1301-1363) HEMMERLE argued in response to the motion for directed verdict. (T. 1363-1397). HEMMERLE also submitted to the court below a memorandum in opposition to the motion for directed verdict. (R. 2835-2837, T. 1398-1399). The Court received all of the case law submitted by the parties directed to the motion for directed verdict to read over the weekend. (T. 1390-1399) On Monday, November 23, 1987 the lower court entered a directed verdict in favor of BRAMALEA as to all counts of HEMMERLE'S complaint. (T. 1412-1416). On December 1, 1987 the lower court entered a judgment on the directed verdict. (R. 2840). HEMMERLE filed a Motion for New Trial which was denied on December 7, 1987. (A. 1-6) (R. 2842). It is from the lower court's order directing a verdict in favor of BRAMALEA and entering a judgment thereon that HEMMERLE has brought this appeal.

ARGUMENT

I. THE LOWER COURT ERRED IN DIRECTING A VERDICT FOR THE DEFENDANT BRAMALEA ON ALL COUNTS OF THE COMPLAINT

The lower court erred in directing a verdict for the Defendant, BRAMALEA on all counts of the complaint.

(T. 1412-1416). Counts I (Recission) and IV, (Fraudulent misrepresentation) of the complaint alleged that HEMMERLE was fraudulently induced to sign the March 2, 1981 Indenture Agreement releasing his development rights in the property upon BRAMALEA'S false representations that he would be awarded the construction contract on Parcel E if he was the low bidder. (R. 1439-1477). The lower court erroneously based its directed verdict as to Counts I and IV of the complaint on the decision of *Harrington v. Rutherford*, 38 Fla. 321, 21 So. 283 (1896), stating, "This could be considered a promise to perform in the future, and mere nonperformance of a promise without a showing of fraudulant [sic] intent, wouldn't withstand the motion for directed verdict. (T. 1412). By this language the lower court essentially found that BRAMALEA'S false representations to HEMMERLE regarding the right to bid was a promise to perform in the future and will not amount to fraud in a legal sense. This finding was clearly contrary to the allegations and proof in the instant case as well as the law of the State of Florida.

It is well settled in the State of Florida as stated by the Court in *Machado v. Foreign Trade, Inc.*, 478 So. 2d 405, 407 (Fla. 3d DCA 1986):

> Compensatory and punitive damages are recoverable for fraud in the inducement and an action may be based upon oral or written representations in the form of contractual promises or statements of present intention. *Haendel v. Paterno*, 388 So. 2d 235, 238 (Fla. 5th DCA 1980); *Ashland Oil, Inc. v. Pickard*, 269 So. 2d 714, 721 (Fla. 3d DCA 1972). *cert. denied*, 285, So. 2d 18 (Fla. 1973). The ultimate decision as to whether

> the acts complained of as fraudulent inducement were intentional and amounted to fraud rests with the jury. *Haendel*, 398 So. 2d at 238; *Associated Heavy Equipment Schools, Inc. v. Masiello*, 219 So. 2d 465, 467 (Fla. 3d DCA 1969).

HEMMERLE'S cause of action under Counts I and IV of his complaint against BRAMALEA was for fraud in the inducement which was based on oral representations in the form of contractual promises and statements of present intention. (R. 1439-1477). HEMMERLE fell squarely within the above authorities which the lower court either overlooked or misapprehended.

Moreover, the lower court not only misread the decision of *Harrington v. Rutherford*, 38 Fla. 321, 21 So. 283 (1896), but it has no application to the instant case because a case for fraud in the inducement was not stated. In *Harrington*, the Plaintiff entered into an agreement with one Rutherford to convey him 85 acres of land if he (Rutherford) would pay certain promissory notes executed by the Plaintiff. The land was conveyed pursuant to this agreement to pay the notes, but Rutherford failed and refused to pay the promissory notes as promised. In affirming an order dismissing Plaintiff's complaint, the Court held that, "(a) promise to do something in the future, though made by one party as a representation to induce another to enter into a contract will not amount to a fraud in a legal sense, though the promise subsequently and without excuse be broken and unfulfilled. *Id.* at 285. In support of this holding the Court stated:

> The bill before us shows that the complainant, Harrington, being desirous of relieving himself from the payment of the notes, and of protecting his friend Merritt *entered into an agreement with*

> *Rutherford to convey him the land in question, if he would pay the notes, and that the land was conveyed in pursuance of this agreement to pay the notes, it is not shown that complainant was induced to enter into this agreement by any false representations or fraudulent practices whatever.* (emphasis added).

It is clear from the above excerpt taken from the *Harrington v. Rutherford* decision that fraud in the inducement was not pled by the Plaintiff there, i.e., that the Plaintiff, Harrington was induced to enter into the agreement by false representations. Had such a case been stated in the bill (complaint), the Court stated that "a different question would be presented, in reference to which we need not express an opinion". *Id.* at 286. In this case, fraud in the inducement was pled and proven and as such *Harrington v. Rutherford* has no application whatsoever. Moreover, it is interesting to note that the Defendants in *Ashland Oil, Inc. v. Pickard*, 269 So. 2d 714, 720 (Fla. 3d DCA 1972), like BRAMALEA here, relied upon *Harrington v. Rutherford* for the proposition that representations as to promises or future events do not in law constitute fraud which the Court flatly rejected. The Court in *Ashland Oil* stated, "We express the view that an action setting forth the elements of common law deceit, such as for fraud in the inducement, may be based on oral and written representations and these representations may be in the form of contractual promises or statements of present intention." *Id.* at 721.

The proof at trial was overwhelming that the Chairman of the Board of BRAMALEA, J. Richard Shiff, on March 2, 1981 and on February 4, 1981 falsely stated to HEMMERLE for the purpose of inducing HEMMERLE to sign the March 2, 1981 Indenture Agreement that he

would have the right to bid on BRAMALEA'S construction of homes on Parcel E and if he was the low bidder, would be awarded the contract. (T. 359, 360-364, 370, 373, 375, 377, 429, 433, 446, 450, 456, 966, 969-971). Daniel Morgan and William D. Ryan, who was also present at the meeting of March 2, 1981, testified that he recalled J. Richard Shiff stating to HEMMERLE on March 2, 1981 over the telephone as an inducement to have HEMMERLE release his development rights in the property that HEMMERLE would have the right to bid on the construction of homes on Parcel E and if he was the low bidder he would be awarded the contract. (T. 359,360-364, 370, 373, 375, 377, 429, 433, 446, 450, 456). Mr. Hemmerle testified at trial that Mr. Shiff made a verbal commitment to him on March 2, 1981 and on February 4, 1981 that he would be given the contract to build the homes on Parcel E if he was the successful low bidder and that without this promise, HEMMERLE would not have signed the Indenture Agreement on March 2, 1981. (T. 966, 968, 969-971). Mr. Forsyth and Mr. Hemmerle both testified at trial that the reason BRAMALEA did not put HEMMERLE'S right to bid in writing was because BRAMALEA was being deposed the very next day in the Kassuba Bankruptcy litigation and was fearful that if they had any obligations to HEMMERLE in writing, their development project might be subject to a lien. (T. 377, 378, 433, 968). Mr. Forsyth testified at trial that BRAMALEA had two lawyers present at the March 2, 1981 meeting, a Mr. Peter Bennett and a Mr. Lorie Waisberg. (T. 368, 369). Mr. Forsyth testified that both BRAMALEA lawyers made comments regarding the bidding and the oral agreement regarding the bidding (T. 383), and one lawyer gave the

assurance that it was alright to give Mr. Hemmerle the right to bid. (T. 369, 370). Mr. Shiff testified at trial that he and BRAMALEA wanted to sever relations with Mr. Hemmerle because of Mr. Hemmerle's financial problems. (T. 271, 1071, 1147). Mr. Shiff also testified at trial that he recalled no telephone calls to the lawyers representing BRAMALEA at the March 2, 1981 closing and recalls no promise to allow HEMMERLE to bid. (T. 1095, 1096, 1151, 1152).

Mr. Hemmerle further testified that he made several attempts to obtain bid information from BRAMALEA and submit a bid but was simply ignored by BRAMALEA officials. (T. 974, 975). Hemmerle testified that he visited the project and met with Gordon Deson, another BRAMALEA official who assured Mr. Hemmerle that he would be notified when BRAMALEA began accepting bids for the improvement on Parcel "E". (T. 974). He further testified that he was never notified and that Mr. Shiff failed and refused to respond to several telephone calls from him inquiring as to his right to submit a bid for construction of the 150 units. (T. 975). Mr. Hemmerle further testified that he suffered expenses and damages in the form of salaries paid to a project manager and a draftsman as well as the loss of his own time in preparing drawings, estimates, inspecting the project and attempting to obtain bid information. (T. 1039-1042).

The above evidence clearly shows that the oral representations of BRAMALEA through its Chairman, J. Richard Shiff were contractual promises and statements of present intention, were false, were intentional, amounted to fraud and were made to induce Appellant to give up his rights in the property. The lower court erred in taking

this issue from the jury. "The ultimate decision as to whether the acts complained of was fraudulent inducement were intentional and amounted to fraud rests with the jury". *Machado v. Foreign Trade, Inc.*, 478 So. 2d 405 (Fla. 3d DCA 1986); *Haendel v. Paterno*, 388 So. 2d 235, 238 (Fla. 5th DCA 1980); *Associated Heavy Equipment Schools, Inc. v. Masielo*, 219 So. 2d 465, 467 (Fla. 3d DCA 1969). This Court in *Garasche v. Textured Coating of America*, 352 So. 2d 1207 (Fla. 4th DCA 1978) stated that the trial court erred in directing a verdict for defendants since plaintiffs proved, for example, that they relied upon allegedly untrue statements in a brochure that came from the defendants and plaintiffs established that their reliance thereon was to their detriment and otherwise established a prima facia case against defendants. In the instant case there was evidence that Mr. Hemmerle to his detriment relied upon the untrue statements of Mr. Shiff regarding the right to bid as an inducement to execute the March 2, 1981 Indenture Agreement. It is well settled that, "whether or not fraud has been shown to exist in a given case is, as a general rule, a question of fact for the jury". *Florida East Coast Railway v. Thompson*, 93 Fla. 30, 111 So. 525 (1927); *Hunt Truck Sales & Service, Inc. v. Colonel*, 195 So. 2d 624 (Fla. 3d DCA 1967). Moreover, the positive testimony of one witness as to the existence of fraud is sufficient to require the case to be submitted to the jury. *Florida East Coast Railway, supra.*

As the Court in *Sheehan v. Allred*, 146 So. 2d 760, 763 (Fla. 1st DCA 1962) stated:

> Furthermore, a party who moves for a directed verdict admits not only the facts proved by the

> evidence adduced, but also admits every conclusion favorable to the adverse party that the jury might fairly and reasonable infer from the evidence. And, when there is room for a difference of opinion between reasonable men as to the existence of evidentiary facts from which an ultimate fact is sought to be established, or when there is room for such difference as to the inferences which might reasonably be drawn from conceded facts, the court should submit the case to the jury for its finding. *It is the jury's conclusion that should prevail in such case, and not the views of the judge."* (emphasis added)

A directed verdict can only be granted when it is apparent that there is no evidence in the record on which a jury could lawfully find for the plaintiff. *Stenback v. Racing Associates, Inc.*, 394 So. 2d 112B (Fla. 4th DCA 1981). There was plenty of evidence discussed heretofore on which the jury could have found that BRAMALEA fraudulently induced HEMMERLE to sign the March 2, 1981 Indenture Agreement by stating he would be given the contract to build the homes on Parcel E if he was the low bidder. As such, the lower court committed reversible error in directing a verdict as to Counts I and IV of HEMMERLE'S complaint.

The lower court entered a directed verdict in favor of BRAMALEA on Count V of HEMMERLE'S complaint. (T. 1415). In Count V HEMMERLE alleged that BRAMALEA breached the agreement to pay him a fee of $100,000.00 for assisting BRAMALEA in acquiring the Texaco Parcel. (R. 1445-1446). The lower court found that HEMMERLE had released any rights he had under the March 22, 1979 agreement to receive a fee of $100,000.00 for assisting BRAMALEA in acquiring the Texaco Parcel by virtue of

the Indenture Agreement of March 2, 1981. (T. 1415). There was a factual issue presented as to whether this sum was ever paid because BRAMALEA not only failed to service Parcel E to enable HEMMERLE to purchase the parcel within 60 days after completion of servicing, but the Parcel was never purchased by HEMMERLE. Mr. Shiff testified that the $100,000.00 HEMMERLE was to receive for assisting BRAMALEA in acquiring the Texaco Parcel would be applied as a down payment on Parcel E. (T. 1137). Mr. Hemmerle agreed to this. (T. 928) The October 12, 1979 agreement reflects the agreement of the parties in this regard. Please see Plaintiff's Exhibit 9. Mr. Shiff also testified that Parcel E was never conveyed to HEMMERLE. (T. 1138). Mr. Hemmerle testified that BRAMALEA never serviced Parcel E to enable him to purchase the property. (T. 931, 951). Once the $100,000.00 fee earned for assisting BRAMALEA in obtaining the Texaco parcel was applied to the down payment on Parcel E, the option to purchase Parcel E was exercised. (T. 1068). As soon as BRAMALEA completed the servicing of Parcel E, HEMMERLE could purchase Parcel E within 60 days. See Plaintiff's Exhibits 2, 38 and 65. However, BRAMALEA never completed the servicing of Parcel E to enable HEMMERLE to purchase it. (T. 93). Mr. Hemmerle testified that BRAMALEA never returned the $100,000.00 down payment on Parcel E in spite of their refusal to sell him the property. (T. 943, 951).

The Indenture Agreement of March 2, 1981 did not specifically release HEMMERLE'S rights under the March 22, 1979 agreement. The Indenture Agreement did not even mention the March 22, 1979 agreement. Please see Plaintiff's Exhibit 68 and 12.

The above evidence adduced at trial clearly establishes that there was room for a difference of opinion between reasonable men as to evidentiary facts from which an ultimate fact was sought to be established, namely, that HEMMERLE was entitled to the fee of $100,000.00 for assisting BRAMALEA in acquiring the Texaco Parcel. *Sheehan v. Allred*, 146 So. 2d 760 (Fla. 1st DCA 1962). In other words, there was sufficient evidence in the record on which the jury could lawfully have found that BRAMALEA failed to pay HEMMERLE the $100,000.00 when it failed to service Parcel E so that HEMMERLE could ultimately purchase the parcel. *Stenback v. Racing Associates, Inc.*, 394 So. 2d 1128 (Fla. 4th DCA 1981).

The lower court entered a directed verdict in favor of BRAMALEA on Counts II (Breach of Contract) and III (Unjust Enrichment) of HEMMERLE'S complaint. (T. 1416). In Counts II and III, HEMMERLE alleged that BRAMALEA breached an agreement to pay him interest at prime on the 1.3 million dollars that was held in escrow by BRAMALEA'S lawyers (Katcher, Sharlin and Lanzetta) from the time BRAMALEA received title to the property by way of a Clerks Certificate of Title (February 10, 1979) until receipt of the funds on June 1, 1979. (T. 1200). The lower court found that HEMMERLE had released any claim that he may have had against BRAMALEA under paragraph five of the March 2, 1981 Indenture Agreement. (T. 1416). This was the same analysis the lower court used in directing a verdict in favor of BRAMALEA on Count V of HEMMERLE'S complaint. (T. 1415). The lower court erred in directing a verdict in favor of BRAMALEA on Counts II, III and V of the

complaint under the authority of *Steak House, Inc. v. Barnett*, 65 So. 2d 736, (Fla. 1953). In *Steak House, Inc.*, the Court stated, "where at the time of the execution of a contract the party promising to perform an act in the future has a secret undisclosed intent not to carry it out, but fraudulently represents that he will perform as an inducement to the other party to enter into the contract, such fraud is ground for recission [sic] in equity regardless of whether the act to be performed constituted the entire consideration or not". In the instant case in Counts I (Recission [sic]) and IV (Fraud in the Inducement), HEMMERLE pled and proved that at the time the Indenture Agreement of March 2, 1981 BRAMALEA promised to allow him to bid the improvements on Parcel E and if he was the low bidder, award him the construction contract but had a secret undisclosed intent not to carry it out. BRAMALEA made this misrepresentation as an inducement for HEMMERLE to sign the March 2, 1981 Indenture Agreement. Under *Steak House, Inc.*, such is grounds for recission [sic] in equity. As such, the lower court should have rescinded the March 2, 1981 Indenture Agreement. Once the Indenture Agreement was rescinded, it could not be used as a basis for defeating CountS II, III and V of HEMMERLE'S complaint because it would no longer have had any force or effect.

Factual issues regarding whether BRAMALEA breached its agreement to pay interest existed and should have gone to the jury. Mr. Hemmerle testified at trial that 2 million of the 3.7 million was paid to the Clerk of the Palm Beach County Circuit Court. (T. 1196). $100,000.00 had already been placed in Attorney Jack Jensen's trust account. (Plaintiff's Exhibit 60). That left a balance of 1.6

million in the escrow account of BRAMALEA'S lawyers. (T. 1197). Out of that 1.6 million, $303,000.00 was held back by BRAMALEA because those funds were attributable to the 14.77 acres that HEMMERLE couldn't convey title to because it was tied up in bankruptcy. (T. 1197). BRAMALEA was entitled to interest on the $303,000.00 while those funds remained in escrow. (T. 1206). After subtracting $303,000.00 from 1.6 million, a balance of 1.297 million is arrived at. (T. 1197). Mr. Hemmerle testified that he was entitled to interest on the 1.297 million from February 10, 1979 (the date BRAMALEA received title to the property by way of a Clerk's Certificate of Title until those funds were released). (T. 1197, 1198, 1200, 1219, 1273-1276) Mr. Hemmerle further testified that he was entitled to $60,721.42 that was held back by BRAMALEA as an additional hold back adjustment as to Parcel C-3 due on the overall correct acreage adjustment from 180 acres down to 150 acres. (T. 1280) BRAMALEA already received consideration for the acreage adjustment by increasing the per acre price of Parcel E from $33,000.00 per acre to $50,000.00 per acre. (T. 1280). Essentially, when BRAMALEA erroneously charged HEMMERLE $60,721.42 for the acreage adjustment, BRAMALEA was charging him twice for the same thing.

II. THE LOWER COURT ABUSED ITS DESCRETION [sic] IN REFUSING TO PERMIT APPELLANT TO AMEND HIS PLEADINGS AT TRIAL

HEMMERLE moved to amend his pleadings during his case in chief to include a claim for breach of an oral promise to pay back the $100,000.00 fee earned with respect to the Texaco Parcel and with regard to an oral

agreement to pay the interest on the funds held in escrow by BRAMALEA'S attorneys. (T. 612). These representations were made just prior to the execution of the March 2, 1981 Indenture Agreement on or about February 4, 1981. (T. 613, 1424). Counsel for BRAMALEA objected these issues as being outside the scope of the pleadings. (T. 619). "If evidence is objected to at trial on the grounds it is not within the issues made by the pleadings, the Court may authorize amendment so as to facilitate presentation of the merits of the case". *Robins v. Grace*, 103 So. 2d 658, 660 (Fla. 2d DCA 1958). Under the Federal rules, "it has been held that the plaintiff was not bound by his pleadings but could offer his proof on the presentation that the merits of the action will be subserved thereby. *Newman v. Zinn*, 3 Cir., 1947, 164 F. 2d 558" *Id.* "Amendments to pleadings and amendments to conform with the evidence should be freely granted by the trial court unless by doing so, the opposing party will be prejudiced in maintaining his action or defense upon the merits". *Lasar Manufacturing Company v. Brachanov*, 436 So. 2d 236 (Fla. 3d DCA 1983). "Under Rule 1.190, a test of prejudice to the defendant is the primary consideration in determining whether a motion for leave to amend should be granted or denied. *Id.* at 238. BRAMALEA could not have been prejudiced by the amendment or surprised at trial because BRAMALEA took the deposition of HEMMERLE on October 20, 1986 and HEMMERLE specifically stated what the oral agreements were that he had with J. Richard Sniff, the Chairman of BRAMALEA on February 4, 1981. (T. 614, 615, 616). The lower court abused its descretion [sic] in not permitting HEMMERLE to amend his pleadings to conform with the

evidence because BRAMALEA was not surprised or prejudiced and the amendments would have facilitated the presentation of the merits of the case.

CONCLUSION

Based upon the authorities and arguments advanced herein, Appellant respectfully requests that the order of the lower court directing a verdict in favor of BRAMALEA on all counts of the complaint and the judgment thereon (R. 2840) be reversed and this cause remanded for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to MICHAEL S. OLIN, Esq., Suite 800, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130 this ___ day of July, 1988.

KENNETH V. HEMMERLE
Appellant
808 Northeast Third Avenue
Fort Lauderdale, Florida 33304
Telephone: (305) 467-6801

APPENDIX E

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

KENNETH V. HEMMERLE,

Appellant,

-VS-

CASE NO. 88-01844

BRAMALEA, INC., f/k/a BRAMALEA DEVELOPMENT U.S., LTD., a Delaware corp.,

Appellee.

_____/

APPELLANTS' INITIAL BRIEF
APPEAL FROM

The Circuit Court of the Fifteenth Judicial Circuit of Florida in and for Palm Beach County

KENNETH V. HEMMERLE
808 Northeast Third Avenue
Fort Lauderdale, Florida 33304
Telephone: (305) 467-6801

PREFACE

Appellant, KENNETH V. HEMMERLE was the Plaintiff in the Court below. Appellee, BRAMALEA, INC., f/k/a BRAMALEA DEVELOPMENT U.S., LTD., a Delaware corp. was the Defendant.

This is an appeal from an order awarding BRAMALEA costs and attorney's fees pursuant to Section 45 061 Fla. Stat. (Supp. 1987). (R. 23)

In this Brief, the parties shall be referred to as they stood in the Court below. The symbol (T. . . .) will be used to reference the trial transcript. The symbol (R. . . .) will be used to reference the Record. The symbol (A. . . .) will be used to reference the Appendix. Exhibits entered into evidence will be designated as either Plaintiff's or Defendant's.

Appellants will be filing a motion to consolidate this appeal with his appeal of the judgment entered on the directed verdict in Case No. 87-3281. The record in Case No. 87-3281 begins with the number 1439 and ends with the number 2871. The record in this appeal begins with the number 1 and ends with the number 27. Appellant uses the record citations as if the two appeals were consolidated at this time.

All emphasis appearing in this Brief shall be that of the author, unless otherwise noted.

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CITATION OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND OF THE FACTS

Between January, 1979 and March, 1981, HEMMERLE and BRAMALEA entered into several agreements with respect to the purchase, sale and development of certain tracts of real estate located in South Palm Beach County. (See pages iv - x of Appellant's Initial Brief in Case No. 87-3281) As a result of certain breaches of the parties' agreements and fraudulent misrepresentations in connection with the execution of those agreements by BRAMALEA, HEMMERLE brought a five-count complaint for damages and equitable relief against BRAMALEA in the court below. (R. 1439-1477). BRAMALEA filed an answer on April 17, 1985, (R. 1550-1551), and an amended answer and affirmative defenses on June 28, 1985 (R. 1559-1560). BRAMALEA moved for Summary Judgment on all counts of the complaint on December 10, 1986. (R. 1668-1724). HEMMERLE filed a response to the Motion for Summary Judgment. (R. 1725-1774). The Motion for Summary Judgment was denied on January 6, 1987. (R. 2052). BRAMALEA filed an amended answer on January 30, 1987. (R. 2113-2114). On July 8, 1987, BRAMALEA renewed its Motion for Summary Judgment. (R. 2146-2198). HEMMERLE responded to the renewed Motion for Summary Judgment. (R. 2199-2249). The motion was denied.

The matter was tried before a jury in the court below between November 16, 1987 and November 23, 1987. (T. 1-1438). Between November 16, 1987 and November 20,

1987, HEMMERLE put on his case in chief and in the evening of November 20, 1987 rested. (T. 45-1294). BRAMALEA moved for a directed verdict on all counts of HEMMERLE'S complaint. (T. 1301-1363) HEMMERLE argued in response to the motion for directed verdict. (T. 1363-1397). HEMMERLE also submitted to the court below a memorandum in opposition to the motion for directed verdict. (R. 2835-2837, T. 1398-1399). The Court received all of the case law submitted by the parties directed to the motion for directed verdict to read over the weekend. (T. 1390-1399). On Monday, November 23, 1987 the lower court entered a directed verdict in favor of BRAMALEA as to all counts of HEMMERLE'S complaint. (T. 1412-1416). On December 1, 1987, the lower court entered a judgment on the directed verdict. (R. 2840). HEMMERLE filed a Motion for New Trial which was denied on December 7, 1987. (See Appendix 1-6 to Appellant's Initial Brief in Case No. 87-3281), (R. 2842). On December 18, 1987, HEMMERLE filed his notice of appeal from the lower court's order directing a verdict in favor of BRAMALEA and entering a judgment thereon. (R. 2843). That appeal is before this Court in Case No. 87-3281.

On November 24, 1987, BRAMALEA filed a motion to tax attorney's fees pursuant to Section 768.79 Fla. Stat. and a motion to tax costs. (R. 2838-2839). On December 1, 1987 the lower court entered an order setting the motions to tax attorney's fees and costs for Monday, April 4, 1988 at 9:45 A.M. (R. 2841).

On Monday, April 4, 1988 at 9:45 A.M., the motions to tax attorney's fees and costs came on for hearing before the court below. (R. 1-15). At the hearing, counsel for

BRAMALEA advised the lower court that a mistake had been made and that the motion to tax attorney's fees should have been based upon Section 45.061 Fla. Stat. (Supp. 1987) rather than Section 768.79 Fla. Stat. (R. 1-15). HEMMERLE objected as he was there prepared to argue that Section 768.79 Fla. Stat. had no application to this case. In support of its motions, BRAMALEA submitted lists of amounts for professional services rendered and its written offer judgment. (R. 2857-2870). HEMMERLE submitted to the Court the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions. (R. 2853-2856). The lower court granted HEMMERLE 10 days to file a memorandum of law in opposition to the motions to tax attorney's fees and costs. (R. 1-15). HEMMERLE promptly filed his Memorandum of Law in Opposition to Defendant, BRAMALEA'S Motion to Tax Attorney's Fees and Costs. (R. 1-15). The lower court gave BRAMALEA an extension of time within which to file a responsive memorandum to HEMMERLE'S memorandum. On or about May 17, 1988 BRAMALEA filed its reply to Plaintiff's Memorandum of Law in Opposition to Defendant's Motions to Tax Attorney's Fees and Costs. (R. 16-22). On June 16, 1988 the lower court entered an order awarding attorney's fees in the amount of $40,813.75 and costs in the amount of $3,950.32 to BRAMALEA pursuant to Section 45.061 Fla. Stat. (Supp. 1987) (R. 23). It is from that order awarding attorney's fees and costs that HEMMERLE has lodged this appeal (R. 24).

ARGUMENT

I. THE LOWER COURT ERRED IN AWARDING ATTORNEY'S FEES AND COSTS TO BRAMALEA BY RETROACTIVELY APPLYING SECTION 45.061 FLA. STAT. (SUPP. 1987) BECAUSE THE STATUTE CONSTITUTES A NEW OBLIGATION OR DUTY, IS SUBSTANTIVE IN NATURE AND THERE IS NO EXPLICIT LEGISLATIVE EXPRESSION THAT THE STATUTE SHOULD OPERATE RETROACTIVELY.

The lower court erred in awarding attorneys fees and costs to BRAMALEA by retroactively applying Section 45.061 Fla. Stat. (Supp. 1987) to the instant case which was commenced in the court below in 1984 for causes of action accruing prior to 1984 because the statute constitutes a new obligation or duty, is substantive in nature and there is no explicit legislative expression that the statute should operate retroactively. Section 45.061 Fla. Stat. (Supp. 1987) is not applicable to the instant case. Section 45.061 Fla. Stat. (Supp. 1987) became effective on July 2, 1987 and has prospective effect only. The instant case was commenced in the lower court in 1984 for causes of action which accrued prior to 1984. (R. 1439-1477). At the time the lawsuit was commenced Section 45.061 Fla. Stat. (Supp. 1987) was not in existence. The causes of action accrued prior to the effective date of Section 45.061 Fla. Stat. (Supp. 1987). "In Florida, it is clear that in the absence of an explicit legislative expression to the contrary, a substantive law is to be construed as having prospective effect only". *Young v. Altenhaus*, 472 So. 2d 1152, 1154 (Fla. 1985); *State v. Lavazzoll*, 434 So. 2d 321 (Fla. 1983). *Sedden v. Harpster*, 403 So. 2d 409 (Fla. 1981); *Trustee of Tufts College v. Triple R Ranch, Inc.*, 275 So. 2d 521

(Fla. 1973). "This rule mandates that statutes that interfere with vested rights will not be given retroactive effect". *Young v. Altenhaus*, at 1154.

The Supreme Court of Florida stated in *Young v. Altenhaus*, 472 So. 2d 1152, 1154 (Fla. 1985):

> As we explained in *Rowe*, the American Rule adopted in Florida requires each side to pay its own attorney's fees unless directed otherwise statute or an agreement between the parties. *Given this rule of law, we find that a statutory requirement for the non-prevailing party to pay attorney fees constitutes "a new obligation or duty", and is therefore substantive in nature. See Whitten v. Progressive Casualty Insurance Co.*, 410 So. 2d 501 (Fla. 1982). In the instant cases, Altenhaus' and Mathews' rights to enforce their causes of actions for malpractice against the defendants below vested prior to the effective date of the section 768.56. When these causes of action accrued, neither party was statutorily responsible for the opposing party's attorney's fees nor entitled to such an award. We agree with the First District Court of Appeal's recent decision in *Parrish v. Mullis*, 458 So. 2d 4 (Fla. 1st DCA 1984), in which that court stated:
>
> > When appellant's cause of action accrued, she was not burdened with the potential responsibility to pay the successful party's attorney's fees and costs, and appellee was not entitled to that right. The right and responsibility were later created by the legislature . . . [W]e hold that section 768.56 may not be retroactively applied to a cause of action which accrued prior to its effective date. (Emphasis added)

Id at 1154. *Young v. Altenhaus* is controlling here. Section 45.061 Fla. Stat. (Supp. 1987) is a statutory requirement for the nonprevailing party to pay attorney fees and

constitutes a new obligation or duty and is therefore substantive in nature. Florida law is very clear that in the absence of an explicit legislative expression to the contrary, a substantive law has prospective effect only. Section 45.061 Fla. Stat. (Supp. 1987), is a substantive law and has prospective effect only because there is no explicit legislative expression that the stature [sic] has retroactive application.

Moreover, in the instant case HEMMERLE'S causes of action vested prior to the effective date of Section 45.061 Fla. Stat. (Supp. 1987). When HEMMERLE'S causes of action accrued or were filed, neither party was statutorily responsible or could be responsible for the opposing party's attorney's fee nor entitled to such an award. In other words, when HEMMERLE'S causes of action accrued or were filed, he was not burdened with the potential responsibility to pay the successful party's attorney's fees and Defendant, BRAMALEA was not entitled to that right. The right and responsibility were created years later by the legislature on July 2, 1987, the effective date of the statute. Thus, Section 45.061 Fla. Stat. (Supp. 1987) may not be retroactively applied here to causes of action which accrued prior to its effective date and the lower court erred in doing so.

In *L. Ross Inc. v. R.W. Roberts Construction Co.*, 481 So. 2d 484 (Fla. 1986), the Florida Supreme Court held that a statutory right to attorney fees is a substantive right, as is the burden on the party responsible for paying the fee and may not be applied retroactively to a cause of action that was already in existence at the time of the effective date of the statute. Thus, a right to attorney fees under Section 45.061 Fla. Stat. (Supp. 1987) is a substantive right

as is the burden on the party responsible for paying the fee and may not be applied retroactively to causes of action here that were already in existence at the time of the effective date of the statute, i.e., July 2, 1987.

This Court stated in *Brown v. Broward Hospital District*, 521 So. 2d 143, 146 (Fla. 4th DCA 1988):

> Therefore, since the cause of action herein accrued prior to the effective date of the statute, the statute is inapplicable and we must deny the motions for attorney's fees. *See Young v. Altenhaus*, 472 So. 2d 1154 (Fla. 1985).

As such, under *Brown v. North Broward Hospital District*, the order under review must be reversed because the causes of action accrued prior to the effective date of Section 45.061 Fla. Stat. (Supp. 1987).

In *American Motors Corporation v. Abrahantes*, 474 So. 2d 271 (Fla. 3d DCA 1985) the Court said: "[a] statute is not to be given a retrospective effect unless its terms show *clearly* that such an effect was intended," *In re Seven Barrels of Wine*, 79 Fla. 1, 17, 83 So. 627, 632 (Fla. 1920) (emphasis supplied); *See also*, e.g., *Fleeman v. Case*, 342 So. 2d 815 (Fla. 1976),. . . ."As such, Section 45.061 Fla. Stat. (Supp. 1987) is not to be given retrospective effect because its terms do not show *clearly* that such an effect was intended requiring that the order under review be reversed.

BRAMALEA argued in the Court below that Section 45.061 Fla. Stat. (Supp. 1987) is a remedial statute or a statute relating to remedies or modes of procedure and thus excepted from the general rule that statutes shall be applied prospectively. (R. 16-22) This argument lacks

merit. First, the statute by its terms must *clearly* show that retrospective effect was intended which Section 45.061 Fla. Stat. (Supp. 1987) does not do. Secondly, in an analogous situation the Florida rules of court are rules or modes of procedure and they have prospective effect only, unless expressly provided otherwise. The Court in *Jackson v. Green*, 402 So. 2d 553, 554 (Fla. 1st DCA 1981) stated, "Florida rules of court have prospective effect only, unless expressly provided otherwise." Moreover, the Florida Supreme Court stated in *Poyntz v. Reynolds*, 37 Fla. 533, 19 So. 649 (1896):

> The rules of practice for the government of this court adopted at the June term, 1895, did not go into effect or become operative until the 15th day of October 1895, and do not apply to or affect any cause brought here prior to the last-named date, except in those instances and in those respects wherein the rules themselves in express terms provide for the application to causes that may have been brought here prior to that date; . . .

Id. at 650. Additionally, the Committee Notes, 1977 Revision under Fla. R. App. P. 9.010 state in pertinent part: "A transition provision has been incorporated to make clear that proceedings already in the appellate stage prior to the effective date will continue to be governed by the former rules until the completion of appellate review in the court in which it is pending on the effective date." Thus, since rules of court are rules and modes of procedure, they are not to be given retrospective effect unless they expressly say so. Thus, BRAMALEA'S argument that Section 45.061 Fla. Stat. (Supp. 1987) is procedural and must be given retrospective effect lack merit and must be rejected because the legislature has not expressly

stated that said statute be given retrospective effect. Therefore, the order under review must be reversed.

In *St. John's Village I. Ltd. v. Dept. of State, Division of Corporations*, 497 So. 2d 990 (Fla. 5th DCA 1986) the Court stated:

> The Florida Supreme Court has noted:
>
> > Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes. *City of Lakeland v. Catinella*, 129 So. 2d 133 (Fla. 1961). *See also Senfeld v. Bank of Nova Scotia Trust Co.*, 450 So. 2d 1157 (Fla. 3d DCA 1984); *Heberle v. P.R.O. Liquidating Co.*, 186 So. 2d 280 (Fla. 1st DCA 1966).

Under the above rule if the Court construes Section 45.061 Fla. Stat. (Supp. 1987) as remedial or procedural it cannot be given retrospective effect because the statute creates a new obligation or right. In *Young v. Altenhaus*, 472 So. 2d 1152, 1154 (Fla. 1985), the Florida Supreme Court said, "we find that a statutory requirement for the non-prevailing party to pay attorney fees constitutes a "new obligation or duty", and is therefore substantive in nature".

When HEMMERLE'S causes of action accrued or were filed, neither party was statutorily responsible or could be responsible for the opposing party's attorney's fees nor entitled to such an award. In other words, when HEMMERLE'S causes of action accrued or were filed he was not burdened with the potential responsibility to pay

the successful party's attorney's fees and Defendant, BRAMALEA was not entitled to that right. The right and responsibility were created years later by the legislature on July 2, 1987, the effective date of the statute. Since new obligations or rights were created by Section 45.061 Fla. Stat. (Supp. 1987) the lower court committed reversible error in applying the statute retroactively.

II THE LOWER COURT ERRED IN AWARDING FEES PURSUANT TO SECTION 45.061 FLA. STAT. (SUPP. 1987) BECAUSE BRAMALEA FILED ITS MOTION FOR ATTORNEY FEES UNDER SECTION 768.79 FLA. STAT. AND NOT SECTION 45.061 FLA. STAT. (SUPP. 1987)

Section 45.061 Fla. Stat. (Supp. 1987) is also not applicable to the instant case because Defendant, BRAMALEA did not file a motion pursuant to Section 45.061(2) Fla. Stat. (Supp. 1987) within 30 days after the entry of judgment. This Court entered judgment on the directed verdict on December 1, 1987. (R. 2840) That judgment did not become final until December 7, 1987 at which time the motion for new trial was denied. (R. 2842). Defendant, BRAMALEA filed a Motion to Tax Attorney's Fees on November 24, 1987 pursuant to Section 768.79 Fla. Stat. (R. 2839). The motion was not made pursuant to Section 45.061 (2) Fla. Stat. (Supp. 1987). Therefore, Section 45.061 Fla. Stat. (Supp. 1987) is not applicable here.

Moreover, it is well settled that an award of relief not sought by the pleadings is error and the jurisdiction of the court can be exercised only within the scope of the pleadings. *Freeman v. Freeman*, 447 So. 2d 963 (Fla. 1st DCA 1984); *Hernandez v. Hernandez*, 444 So. 2d 35 (Fla. 3d

DCA 1983); *Fine v. Fine*, 400 So. 2d 1254 (Fla. 5th DCA 1981). In the instant case BRAMALEA filed its motion for attorney's fees pursuant to Section 768.79 Fla. Stat. and not Section 45.061 Fla. Stat. (Supp. 1987). As such, the lower court lacked jurisdiction to award fees pursuant to Section 45.061 Fla. Stat. (Supp. 1987) because BRAMALEA did not file a motion pursuant to Section 45.061 Fla. Stat. (Supp. 1987) within the time and in the manner required by the statute. Therefore, the order under review must be reversed.

III. THE TRIAL COURT'S ORDER GRANTING ATTORNEY'S FEES AND COSTS TO APPELLEE WAS CONTRARY TO THE LAW

Attorney's fees should not have been awarded to BRAMALEA in this case because BRAMALEA failed to furnish to Plaintiff records detailing the amount of work performed prior to the hearing on April 4, 1988. (R. 1-15) In *Southern Shipping Company v. Flagship First National Bank*, 366 So. 2d 855, 856 (Fla. 3d DCA 1983) a judgment awarding fees and costs was reversed because according to the Court:

> the affidavits having been served on the defendants only on the day of the hearing. The effect of this procedure was to deprive the defendants of an opportunity to object to the entitlement to attorney's fees or in the amount thereof, or to present evidence and argument in contravention of the items claimed as costs.

Id. at 856. By not receiving any records or evidence detailing the amount and nature of the work performed by counsel for BRAMALEA, HEMMERLE was deprived of

an opportunity to object to the entitlement to attorney's fees or to the amount thereof, or to present evidence and argument in contravention thereof. (R. 1-15) To this date, HEMMERLE has not received records detailing the amount and nature of work performed by counsel for BRAMALEA.

Additionally, BRAMALEA failed to present detailed evidence of the services performed by its counsel, which is fatal to it's [sic] claim for fees. The Court in *Mercy Hospital, Inc. v. Johnson*, 431 So. 2d 687 (Fla. 3d DCA 1983) reversed an award of fees for failure to present detailed evidence of services and stated:

> The court heard neither testimony nor competent evidence detailing the nature of the services performed. To support his testimony, Johnson offered a written statement, admitted over objection, describing in general terms what he achieved but offering no details to enlighten the court as to the manner in which he performed his obligation.

Although counsel for BRAMALEA testified at the hearing on April 4, 1988, the testimony did not detail the nature of the services performed nor did the testimony enlighten the Court as to the manner in which counsel performed his obligation and as such the lack of detailed evidence in this regard requires a reversal of the order awarding fees. (R. 1-15).

The lower court erred in awarding BRAMALEA the costs of depositions according to the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions. First, none of the depositions of parties or witnesses listed by BRAMALEA were read into evidence in their entirety by

BRAMALEA. (R. 1-15). Secondly, none of the depositions of parties or witnesses listed by BRAMALEA were used to successfully support a Motion for Summary Judgment. (R. 1-15). Thirdly, none of the depositions of parties or witnesses listed by BRAMALEA were used by BRAMALEA to defeat a Motion for Summary Judgment. (R. 1-15). Under these circumstances only the cost of original pages actually used, plus Court Reporter's per diem, plus the cost of one copy of pages actually used may be taxed if the Court finds that the witness was impeached. (R. 1-15) Any additional pages of the depositions not used by BRAMALEA for which taxation is sought could not be taxed because BRAMALEA did not logically demonstrate that the additional pages were reasonably necessary under the facts and circumstances of the case. (R. 1-15).

The lower court did not make a finding that the portions of depositions used by BRAMALEA at trial impeached the witness nor did BRAMALEA show to the lower court that the witnesses were impeached by use of their depositions. (R. 1-15) BRAMALEA simply failed in its burden to point out the pages actually used and if used for impeachment, to show how and in what manner the portions read actually impeached the witness. As such, the depositions listed could not be taxed as costs.

With regard to the remaining depositions of witnesses not used by BRAMALEA at trial for any purpose, the costs should not have been taxed because BRAMALEA failed in its burden to logically demonstrate that the taxing of these depositions were reasonably necessary. (R. 1-15).

Costs of the daily copy of trial transcript used for consultation with the client or other expert witnesses should not have been taxed. BRAMALEA did not demonstrate to the lower court that any daily was used to impeach a witness. (R. 1-15). Costs of telephone calls to witnesses, arranging for witnesses conferences or scheduling depositions or for attendance at trial listed by BRAMALEA should not have been taxed. Costs of Xerox copies only filed in the Court file and received in evidence at trial could be taxed. All other copies not included in that category could not have been taxed. BRAMALEA did not distinguish between the two categories. (R. 1-15). Additionally, costs of making copies of depositions are not recoverable as costs. *Bolton v. Bolton*, 412 So. 2d 72 (Fla. 2d DCA 1982). Travel expenses of BRAMALEA'S counsel are not awardable as costs. *Florida Gas Company v. Spectra-Physics, Inc.*, 406 So. 2d 1280 (Fla. 1st DCA 1981) and as such it was error for the lower court to award costs in this category. For example, in this category BRAMALEA listed $3,468.22 expenses of Attorney Diaz 12/01/87, expenses/WPB/ Nov. 1987. (A. 9). An award of travel expenses here would violate *Florida Gas Company, supra*. The same argument would apply to Attorney Olin, expenses/Mo/VMD/WPB/Nov. 1987 of 294.45. (A.10). Travel expenses of counsel are simply not permitted. BRAMALEA listed other travel expenses of its counsel, e.g., Michael Olin, $200.00 on 11/13/87; Kevin Antkiewicz, $31.75 on 11/25/87; Victor Diaz $132.00 on 11/30/87; Victor Diaz $49.22 on 10/10/87; $88.22 on 10/21/87; Michael Olin, $37.50 on 10/28/87; Michael Olin, $22.00 on 9/15/87; $29.50 on 9/03/87; Victor Diaz, $38.25 on 9/30/87; and Victor Diaz, $436.63 on 12/16/87.

(A. 3-11). The amount of time spent between 11/03/87 and 11/23/87 by counsel for BRAMALEA according to their records was 224 hours between two attorneys and 13.75 hours for a third attorney. (A. 7) This amount of time is inherently incredible. In order to reach 224 hours in twenty days would mean that each attorney had to spend in excess of 5 hours each day for the period of twenty days. Such is highly improbable in light of the fact that three weekends intervened in that period of time meaning that each lawyer worked over 5 hours on Saturdays and Sundays for the three intervening weekends. As such, the order awarding fees must be reversed.

CONCLUSION

Based upon the authorities and arguments advanced herein, Appellant respectfully requests that the order of the lower court awarding BRAMALEA costs and attorneys fees pursuant to Section 45.061 Fla. Stat. (Supp. 1987), (R. 23), be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to MICHAEL S. OLIN, ESQ., and JOEL S. PERWIN, ESQ., Suite 800, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130 this ___ day of September, 1988.

KENNETH V. HEMMERLE
Appellant
808 Northeast Third Avenue
Fort Lauderdale, Florida 33304
Telephone: (305) 467-6801

APPENDIX F

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1989

KENNETH V. HEMMERLE, Appellant, v. BRAMALEA, INC., f/k/a BRAMALEA DEVELOPMENT U.S., LTD., a Delaware Corp., Appellee.	)	NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF. CASE NO. 87-3281.

Decision filed June 28, 1989

Appeal from the Circuit Court for Palm Beach County; Karen L. Martin, Judge.

Kenneth V. Hemmerle, Fort Lauderdale, pro se appellant.

Joel S. Perwin of Podhurst, Orseck Parks, Josefsberg, Eaton, Meadow & Olin, P.A., Miami, for appellee.

PER CURIAM.

AFFIRMED.

HERSEY, C.J., GLICKSTEIN and DELL, JJ., concur.

APPENDIX G

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

KENNETH V. HEMMERLE,

Appellant,

-VS-

CASE NO.
87-3281

BRAMALEA, INC., f/k/a
BRAMALEA DEVELOPMENT U. S.,
LTD., a Delaware Corp.,

Appellee.

_____/

MOTION FOR REHEARING

Appellant, KENNETH V. HEMMERLE, pursuant to Rule 9.330, Fla. R. App. P., moves this most Honorable Court to rehear and reconsider its decision in this case decided and filed on June 28, 1989, and in support thereof, would show unto the Court the following:

1. By virtue of the Court's Per Curiam Affirmance of the Trial Court's Directed Verdict, this court has overlooked Appellant's right of access to the Court. This Court's decision is contrary to Florida's Declaration of Rights that the courts shall be open to any person for redress of any injury, and to effectuate the security and enjoyment of the "inalienable rights" guaranteed by the Constitution. Although Appellant is a pro se litigant, the Florida Constitution provides that all natural persons are equal before the law. The Constitution of the United States declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. Moreover, the due process clause of the United States

Constitution has been held to embrace equal protection of the laws. *See, Jaminez v. Weinberger,* (1974) 417 S 628, 41 L Ed. 2d 363m 94 So. Ct. 2496. The constitutional inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject class for arbitrary and unjust discrimination. By this Court's decision in this case, it relied upon the trial court's finding that fraud in the inducement was an act of future intention. The decision in this case in conflict with this court's own decision in *Garasche v. Textured Coating of America,* 352 So. 2d 1207 (Fla. 4th DCA 1978) where this Court held that the trial court erred in directing a verdict for defendants since plaintiffs proved that they relied upon allegedly untrue statements in a brochure that came from the defendants. It was clearly proven that Plaintiff relief upon the statement of Appellee's Chairman of the Board as an inducement to execute the March 2, 1981 indenture. Furthermore, it was proven that Defendant's promise to give HEMMERLE the right to bid the Parcel "E" project was part of the consideration for the execution of the March 2, 1981 indenture, and as such, a failure of consideration voided said March 2, 1981 indenture. The Court overlooked the fraud in the inducement and failure of consideration in its decision affirming the trial court's directed verdict.

2. The State and Federal constitutions accord all persons equal rights before the law. The provision in the Florida Constitution that all natural persons are equal before the law, secures to each citizen, notwithstanding his station in life, or whether he is a pro se litigant, equal

rights before the law has been regarded as a guaranty that all persons are entitled to equal consideration and protection of the law for the maintenance and security of the rights to which they are legally entitled, and further applies to the exercise of all courts which can affect the individual or his property. As in the case *sub judice* Appellant has been effectively denied a trial of all the Plaintiff/Appellant claims. This Court overlooked the denial of two previous motions by Defendant, BRAMALEA for Summary Judgment, which established the law of the case regarding whether or not fraud in the inducement was an act of present or future intention. The Motions were based upon the the [sic] same argument that the trial Court granted a directed verdict.

3. Moreover, the State Judiciary may not violate the Due Process Clause even though such violation may occur in the course of interpreting an otherwise valid statute, order, verdict or decision. While the Florida Constitution stipulates that the courts shall be open to every person for redress of any injury, Due Process of law means that no one shall be personally bound until he has had his day in court and been afforded an opportunity to be heard. The Florida Courts have held that a party has not been afforded his "day in court", if a directed verdict has been entered when issues of facts are available to the jury for determination.

4. Plaintiff/Appellant contends that the Lower Court's directed verdict, denied him Due Process and that due process embraces the right to be heard before a competent tribunal. The Plaintiff/Appellant contends that where a party has submitted himself to the jurisdiction of the courts concerning the determination of his

legal rights, he is guaranteed the privilege of having the merits of his cause adjudicated by the proper judicial tribunal, and where a jury trial is to be had, before an impartial jury. It is settled by the law of this state that the duty of the court to apply to admitted facts a correct principle of law is a fundamental and essential element of the judicial process. Furthermore, a litigant cannot be deprived of due process by the judge's failure or refusal to perform that duty.

5. This Court held in *Stenback v. Racing Associates, Inc.*, 394 So. 2d 1128 (Fla. 4th DCA 1981) that a directed verdict can only be granted when it is apparent that there is no evidence in the record on which a jury could lawfully find for the plaintiff. The record reveals that each and every witness testified as to sufficient evidence in which the jury could find for the Plaintiff. In order to apply equal protection of the laws, *Stenback* must apply here. Each person is entitled to stand before the law on equal terms with, to enjoy the same rights as belong to, and to bear the same burdens as are imposed on the other in a similar situation. Equal protection means that the rights of all persons must rest upon the same rule under similar circumstances. Case law should affect alike all persons similarly situated and conditioned with references to a like subject. As such, equal protection forbids unjust discrimination. Although the law may be fair on its face and impartial in appearance, if in its application and administration it unjustly and illegally discriminates between persons in similar circumstances in a manner so as to effect their material rights, there is a denial of equal justice which is prohibited by the Federal Constitution. It is a denial of equal protection of the law to make the

execution of discretion dependent on the unbridled decision of the Trial Court to deny a jury verdict.

6. The refusal of the court to let facts go to the jury amounts to a denial of the right to have "justice administered without denial," as guaranteed by the Declaration of Rights.

7. The trial court determined that the March 2, 1981 indenture was conslusive [sic] and excepted to the terms and conditions of the agreement, such as the right to bid Parcel "E", and if low bidder be permitted to build same, the return of the deposit on Parcel "E" as partial consideration for the execution of such agreement. This obligation of the contract was impaired by the court in the constitutional sense when the substantive rights of the parties under the contract were changed. Any law which materially changes the binding force of a contract necessarily impairs it. Pursuant to Florida Constitution Article I, Section 9, the due process of law and due course of law clauses are to be given full force and effect by the courts. However, it appears that such guarantees have been denied Appellant as well as the course of legal proceedings according to those rules and principles established in our system of jurisprudence for the protection and enforcement of private rights, and as "a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. Law must be adapted to the end to be attained; and whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought".

8. In our system of government there is no place for absolute, arbitrary and despotic power which encroaches

upon the vital rights that have been deliberately retained and reserved to the people and preserved by our constitutional guarantees from invasion or impairment by governmental power of any kind, whether legislative, executive or judicial. Individual rights are measured by constitutional provisions, and not by statutes that in terms or by practical operation invade private rights. Indeed, the Florida Constitution was established to secure the blessings of constitutional liberty, and to secure all individual rights that are consistent with efficient government in the interest of the general welfare. For the lower court to take the case from the jury was in fact a denial of these rights. It is apparent that in the decision of this court it has overlooked the necessary guarantees of the Declaration of Rights.

9. The Declaration of Rights specifically enumerates certain fundamental rights of the people, those include the right of trial by jury. When the Trial Court removed this right from the province of the jury, it denied Plaintiff's fundamental right. The concept of "liberty" in the due process clause of the Fourteen Amendment to the Federal Constitution embraces all the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. No trial court has the authority to avoid the fundamental guarantees of the Consittution, [sic] and as has been shown in the brief before this Court, case law dictated that the trial court erred and reversal should have been mandatory in which to preserve fundamental guarantees provided each citizen. It is clear that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive

any person of life, liberty or property with due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. Indeed, it is the duty and obligation of every court, state and federal, to guard, protect and enforce every right granted or secured by the Constitution whenever such rights are involved in any proceeding before the court and the right is duly and properly claimed or asserted. An Appellate court is obligated to furnish relief against palpable abuses of the trial court as well as plain abuses of delegated powers conferred by law when they interfere with the personal or property rights of individuals. Each particular section of the Delcaration [sic] of Rights contained in the Florida Constitution stands on an equal footing with every other section, and the denial of one of the rights so enumerated is as much a violation of the Constitution of the denial of any other right. The inalienable rights secured by the Florida constitution are designed not only to protect individual rights against unconstitutional invasion by the state, but from violation by other governmental agencies and the entire judicial system as well.

10. It is clear that this Court in arriving at its decision, failed to consider the fundamental deviations, failed to consider the case law in support of the assigned error of the trial court. The court overlooked the decisions which are controlling as authority and which would require a different decision from that rendered, and has erroneously construed and misapplied provisons [sic] of law and such controlling authorities.

11. It is hereby certified that the per curiam affirmance of the trial court by its June 28, 1989 Decision clearly shows the failure to consider the controlling case

law as alleged in Appellants initial brief and Appellants reply brief, as well as the law cited in the foregoing Motion for Rehearing that has been overlooked, and has in fact been overlooked, and that the provisions of law and controlling authorities have been erroneously construed or misapplied, have in fact been so erroneously construed or misapplied.

WHEREFORE, premises considered, and due to the fact that the trial court erroneously relied solely on *Harrington v. Rutherford*, 28 Fla. 321, 21 So. 283 (1896), and unlike the case *sub judice*, *Harrington* failed to plead fraud in the inducement. Further, the Appellate court in *Harrington* stated, had *Harrington* pled that he was induced to enter into an agreement by false representation, a different decision would have resulted. Clearly, the single case relied on by the trial court has no application to the case at bar. The Code of Judicial Conduct and Denominated Canons coupled with the Equal Protection Clause, mandates rehearing and reversal, granting equal protection of the law permitting Plaintiff/Appellant his day in Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Rehearing has been furnished to JOEL S. PERWIN, ESQ., Suite 800, City National Bank Building, 25 West Flagler Street, Miami, Florida 33130 this ___ day of July, 1989.

_____

KENNETH V. HEMMERLE
Appellant

808 Northeast Third Avenue
Fort Lauderdale, Florida 33304
Telephone: (305) 467-6801

APPENDIX H

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT,
P.O. BOX A, WEST PALM BEACH, FL 33402

KENNETH V. HEMMERLE

_____

_____,

Appellant(s),

v.

BRAMALEA, INC., f/k/a
BRAMALEA DEVELOPMENT
U.S., LTD., etc.,

Appellee(s).

CASE NO.
87-3281

ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

August 31, 1989

BY ORDER OF THE COURT:

ORDERED that Appellant's July 6, 1989 Motion for Rehearing is denied.

I hereby certify the foregoing is
a true copy of the original court order.

/s/ Clyde L. Heath,
CLYDE L. HEATH,
CLERK.

cc: Kenneth V. Hemmerle, pro se
Joel S. Persin [sic], Esquire

cms

APPENDIX I

SUPREME COURT OF FLORIDA

WEDNESDAY, OCTOBER 18, 1989

KENNETH V. HEMMERLE, Petitioner, v. BRAMALEA, INC., ETC., Respondent.	** ** ** ** ** ** ** **	CASE NO. 74,884 FOURTH DISTRICT COURT OF APPEAL NO. 87-3281

* *

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

(SEAL)

H

cc: Hon. Clyde L. Heath, Clerk
Hon. John B. Dunkle, Clerk
Hon. Karen L. Martin, Judge

Kenneth V. Hemmerle,
Petitioner

Joel S. Perwin, Esquire

APPENDIX J

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FOURTH DISTRICT — JANUARY TERM 1989

KENNETH V. HEMMERLE,
Appellant,

v.

BRAMALEA, INC., f/k/a BRAMALEA DEVELOPMENT U.S., LTD., a Delaware corp.,
Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

CASE NO. 88-1844.

Opinion filed June 28, 1989

Appeal from the Circuit Court for Palm Beach County; Karen L. Martin, Judge.

Kenneth V. Hemmerle, Fort Lauderdale, pro se appellant.

Joel S. Perwin of Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, P.A., Miami, for appellee.

HERSEY, C.J.

This appeal concerns the appropriateness of costs and attorney's fees assessed against appellant for unreasonable rejection of an offer of settlement pursuant to section 45.061, Florida Statutes (1987).

Appellant first suggests that the statute is substantive in nature and thus may not be applied retroactively. He

argues that because the cause of action arose and the litigation commenced before the effective date of the statute, it does not apply at all in this case. We agree with the holding of the United States District Court in *Richardson v. Honda Motor Co.*, 686 F.Supp. 303 (M.D. Fla. 1988), that the statute is substantive and that it may not be given retrospective application. The question, however, is: What event triggers the remedy provided by the statute? We do not agree with the *Richardson* court that the triggering event is accrual of the cause of action. Neither do we think that it is the commencement of the litigation. Rather, the operative event, the only event crucial to operation of the statute, is the making of an offer of settlement. Only upon the making of an offer of settlement are the respective rights and duties of the parties aligned according to the requirements of the statute, and at that time both parties are free to respond or not to the policies embodied in the statutory scheme without reference to any earlier events. Since the offer of settlement in this case was made after the effective date of section 45.061, we find no impediment to application of the statute.

Appellant's second argument is that appellee proceeded under the wrong statute. We find no merit in this position. Initially the wrong statute was cited, but this was corrected in due course and appellant was not at all prejudiced by the original mistake.

Finally, appellant objects to the amounts taxed against him for costs and attorney's fees. Our review of the record demonstrates error in this regard and requires that we remand for a hearing. We note that only costs and fees incurred or earned "after the making of the offer of

settlement" may be imposed as sanctions under the statute. Conversely, those incurred or earned after final judgment has been rendered also may not be considered for purposes of the sanction. It appears that error occurred both as to costs and, although the record is somewhat unclear, on the measurement of attorney's fees as well.

AFFIRMED in part, and REVERSED in part.

GLICKSTEIN and DELL, JJ., concur.

APPENDIX K

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

KENNETH V. HEMMERLE,

Appellant,

-VS-

BRAMALEA, INC., f/k/a BRAMALEA DEVELOPMENT U.S., LTD., a Delaware corp.,

Appellee.

_____/

CASE NO. 88-01844

APPELLANT'S AMENDED MOTION FOR REHEARING

Appellant, KENNETH V. HEMMERLE, files this Amended Motion for Rehearing and says:

1. Section 45.061 Fla. Stat. (1987) is unconstitutional since the statute affects the orderly practice, procedure and administration of Florida Courts. This argument was not presented in Appellant's briefs filed with the Court. However, "a fundamental constitutional error may be raised at any time." *Parker v. Town of Callahan*, 115 Fla. 266, 156 So. 334, 336 (1934). "The appellate court in the interest of justice may take notice of jurisdictional or fundamental error apparent in the record on appeal whether or not it has been argued in the briefs or made the subject of an assignment of error, objection, or exception in the court below." *Pittman v. Roberts*, 122 So. 2d 333, 334, 335 (Fla. 2d DCA 1960); *Jefferson v. City of West Palm Beach*, 233 So. 2d 206, 207 (Fla. 4th DCA 1970); *Board of Public Construction of Sarasota County v. Fidelity and Casualty Company of New York*, 184 So. 2d 491, 494, (Fla. 2d

DCA 1966). "[Q]uestions relating to fundamental rights or constitutional guarantees may be raised for the first time in an appellate court." *Hillsborough County v. Bennett*, 167 So. 2d 800, 805 (Fla. 2d DCA 1964).

2. Article V, Section 2(a) of the Florida Constitution provides:

> (a) The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. These rules may be repealed by general law enacted by two-thirds vote of the membership of the house of the legislature.

Pursuant to Art. V., Section 2(a), the Florida Constitution's Judiciary Article, the Florida Supreme Court holds the exclusive authority to enact any law relating to the orderly practice, procedure and administration of all Florida courts. *In re Classification of Florida Rules of Practice and Procedure (Florida Constitution, Art. V., Section 2(a)*, 281 So. 2d 204 (Fla. in Camera 1973); *Cozine v. Tullo*, 394 So. 2d 115, 116 (Fla. 1981); *Market v. Johnson*, 367 So. 2d 1003, 1004-1006 (Fla. 1978).

3. In enacting Section 45.061, the Florida Legislature has impermissibly encroached on a prerogative of the judiciary, an area in which the Legislature is forbidden to act. On its face, the express language of Section 45.061 leaves no doubt that the statute is couched in mandatory terms and designed to induce or influence a party to

settle litigation and obviate the necessity of trial. *Compare,* Fla. R. Civ. P. 1.442; *Hernandez v. Travelers Insurance Co.,* 331 So. 2d 329, 331 (Fla. 3rd DCA 1976) (Rule 1.442 is designed to induce or influence a party to settle litigation and obviate the necessity of a trial); *with* May 5, 1987 Staff Analysis of CS/SB 866 [later codified as Fla. Stat. Section 45.061] which records the economic impact on the public as favorable since "[t]his legislation is designed to encourage settlements, and as such could result in lower litigation costs."

4. On May 30, 1989, the Circuit Court for Broward County, Judge Estella May Moriarty, held Section 45.061 Fla. Stat. (1987) unconstitutional under the above analysis in:

ANNE F. McCORMICK and
ROBERT S. McCORMICK,

Plaintiffs,

v.

AUDI OF AMERICA, INC.,
VOLKSWAGEN OF AMERICA, INC.,
AUDI AKTIENGESELLSCHAFT, and
QUASAR BLUE, INC., f/k/a
PORSCHE-AUDI OF BROWARD, INC.,

Defendants.

Case No. 88-05903-CU-MORIARTY. Attached hereto is a copy of Judge Moriarty's Order and Opinion. Based upon the above analysis that Section 45.061 Fla. Stat. (1987) is unconstitutional, the Order under review must be reversed.

WHEREFORE, Appellant respectfully requests the Court to grant rehearing, modify the opinion rendered June 28, 1989 and reverse the Order under review.

APPENDIX L

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, P.O. BOX A, WEST PALM BEACH, FL 33402

KENNETH V. HEMMERLE

_____

_____,

Appellant(s),

v.

BRAMALEA, INC., f/k/a BRAMALEA DEVELOPMENT U.S., LTD., etc.,

Appellee(s).

CASE NO. 88-1844

ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER.

August 31, 1989

BY ORDER OF THE COURT:

ORDERED that Appellant's July 13, 1989 Motion for Rehearing and Appellant's August 2, 1989 amended Motion for Rehearing are denied.

ORDERED that Appellant's August 22, 1989 Request for Oral Argument on Rehearing is denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/ Clyde L. Heath,
CLYDE L. HEATH
CLERK.

cc: Kenneth V. Hemmerle, Appellant
Joel S. Perwin, Esquire

cms

APPENDIX M

SUPREME COURT OF FLORIDA
THURSDAY, JANUARY 18, 1990

KENNETH HEMMERLE, Petitioner, v. BRAMALEA, INC., ETC., Respondent.	)	CASE NO. 74,885 District Court of Appeal, Fourth District No. 88-1844

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, Acting C.J., MCDONALD, SHAW and BARKETT, JJ., concur KOGAN, J., dissents

A True Copy
TEST:
/s/ Sid J. White
Sid J. White
Clerk Supreme Court.
(SEAL)

H
cc: Hon. Clyde L. Heath, Clerk
Hon. John B. Dunkle, Clerk
Hon. Karen L. Martin, Judge

Kenneth V. Hemmerle,
Pro Se

Joel S. Perwin, Esquire

No. 89-1653

In The

Supreme Court of the United States

October Term, 1989

KENNETH V. HEMMERLE,

Petitioner,

vs.

BRAMALEA, INC., f/k/a
BRAMALEA DEVELOPMENT U.S., LTD.,
a Delaware corp.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JOEL S. PERWIN, ESQ.
Counsel of Record
PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN &
PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

May 16, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. WHETHER THE FLORIDA TRIAL COURT'S DIRECTED VERDICT FOR THE RESPONDENT ON HIS STATE-LAW CLAIMS IMPLICATED OR VIOLATED ANY FEDERAL CONSTITUTIONAL RIGHTS.

2. WHETHER THE FLORIDA TRIAL COURT'S AWARD OF ATTORNEYS' FEES TO THE RESPONDENT UNDER A FLORIDA STATUTE IMPLICATED OR VIOLATED ANY FEDERAL CONSTITUTIONAL RIGHTS.

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AUTHORITIES

The respondent, Bramalea, Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of two decisions of the District Court of Appeal of Florida, Fourth District, in this case. The decision on the merits in Case No. 84-3281, a per-curiam affirmance without opinion, is not reported, and is reprinted at p. 61 of the petitioner's appendix ("App."). The decision on the issue of attorneys' fees in Case No. 88-1844 is reported at 547 So.2d 203, and is reprinted at App. 73-75.

STATEMENT OF THE CASE

Petitioner Hemmerle has challenged the Florida trial court's direction of a verdict against him on all of the (state-law) claims which he brought against respondent Bramalea. The judgment was affirmed by the Florida district court of appeal in Case No. 87-3281 (App. 61), and the Florida Supreme Court dismissed the petition for review (App. 72). Petitioner Hemmerle also has challenged the Florida trial court's award of attorneys' fees to Bramalea under a Florida statute, which the Florida appellate court affirmed in Case No. 88-1844 (App. 73), after which the Florida Supreme Court denied review (App. 80).

I. The Directed Verdict. On the former question, Mr. Hemmerle has offered an eight-page summary of the evidence purportedly introduced, without providing a single citation to the trial transcript. He therefore has failed to provide this Court with a sufficient evidentiary basis upon which to appraise the trial court's direction of

a verdict against him on all counts, even assuming *arguendo* that an error in doing so implicated any federal constitutional rights. Although it would be inappropriate for us to undertake the petitioner's burden of summarizing the evidence of record in the light most favorable to his position, we offer below the following abbreviated summary.

As Mr. Hemmerle has stated (Pet. 5-8), he and Bramalea entered into a series of contracts for the purchase and/or development of real property; encountered a number of difficulties; and subsequently entered into a settlement of all claims growing out of these transactions, for which Mr. Hemmerle received $1 million (P.X. 67). At the same time that he was negotiating that settlement, however, Mr. Hemmerle was secretly conveying some of his rights in the project to a corporation which he controlled, so as to retain those rights and keep the $1 million settlement at the same time (*see* Record on Appeal ("R.") at 269-75, 279, 353, 356, 391-400, 443-46, 967-68, 1073-74, 1078-79, 1103-04; D.X. 2, 16). When that scheme unraveled, and Mr. Hemmerle was forced to execute additional releases on behalf of his corporation (P.X. 68; *see* R. 269, 454), Mr. Hemmerle devised an alternative plan for having it both ways. He filed an action charging Bramalea not only with breaching some of the very contracts which he had compromised in return for $1 million, but also with fraud (R. 1439-77). After Mr. Hemmerle had presented his case for six days (R. 1-1294), the trial court concluded that he had failed to create an issue for the jury on any of his claims, and directed a verdict against him (R. 1412-16).

In Counts I and IV of the complaint, Mr. Hemmerle sought recission of the settlement agreement (P.X. 67) on the basis of the single allegation that he had executed the agreement in reliance upon the allegedly-fraudulent misrepresentation that Bramalea would give him a right to bid for the job of constructing any improvements on the property (R. 1441, 1444). In Counts II and III of the complaint, Mr. Hemmerle brought contract claims on the basis of an alleged agreement (which Mr. Hemmerle later testified was an oral agreement, *see* R. 1186-90) assertedly made before the settlement agreement was executed, under which Bramalea had promised to pay him interest "at prime" on a certain sum of money held in escrow by Bramalea's attorneys (R. 1442-44). These two counts, of course, also depended upon the invalidity of the settlement agreement, under which Mr. Hemmerle had compromised all pre-existing claims. Finally, in Count V of the complaint, Mr. Hemmerle alleged that Bramalea had breached a contractual obligation to pay a specified sum of money in consideration of his assistance to Bramalea in purchasing a specific piece of property (R. 1445-46). This count too depended upon invalidating the settlement agreement.

After hearing Mr. Hemmerle's case, the trial court found no evidence that the settlement agreement had been procured by fraud, and therefore directed a verdict against Mr. Hemmerle on all counts (R. 1412-16). In making the motion, as Mr. Hemmerle himself had pleaded in his complaint (R. 1441, 1444), Bramalea acknowledged that under Florida law, a statement of future intention

may be actionable as fraud, but argued that Mr. Hemmerle had offered no evidence "that Bramalea had already at [the time of the alleged promise to permit Mr. Hemmerle to bid on any improvements on the property] had no intention of performing or had no intention of constructing on that project" (R. 1329). At most, therefore, Mr. Hemmerle had proved a breach of promise, but a breach of promise is not actionable as fraud in Florida, in the absence of "an intention to breach that promise at the time the misrepresentation was made" (R. 1330).

Contrary to Mr. Hemmerle's suggestion (Pet. 11), the trial court understood the point precisely, recognizing that a statement of future intention may be actionable as fraud in Florida, but that the "mere non-performance of a promise without a showing of fraudulent intent, wouldn't withstand the motion for directed verdict" (R. 1412). To the contrary, "there would have to be some evidence that there was intent at the time the promise was made to defraud the opposing parties" (R. 1413), and the trial court directed a verdict for Bramalea because "there is no evidence of intent as would be necessary . . . " (*id.*). Thus, there was no evidence that the settlement agreement had been secured through fraud, and the settlement agreement had compromised all of the claims which Mr. Hemmerle had brought against Bramalea.

Mr. Hemmerle appealed to the district court of Florida, and Bramalea sought to defend the trial court's ruling not only on the basis of the settlement agreement which the trial court had found controlling, but on a number of alternative bases. On the two fraud counts, Bramalea argued that for three independent reasons, Mr. Hemmerle

had offered no evidence that he had been damaged by Bramalea's alleged misstatement (damage is an element of liability for fraud under Florida law): 1) he had failed to prove that even if permitted to bid on development of the property, he would have submitted the low bid; 2) whether or not the settlement agreement had been the product of fraud, Mr. Hemmerle had executed an earlier agreement in which he had compromised the same claims; and 3) Mr. Hemmerle had assigned away any and all rights to develop the property, and therefore was not the real party in interest (*see* Brief of Appellee at 15-21, Case No. 87-3281).

On the contract claims growing out of an alleged oral agreement to pay interest on some escrowed funds, Bramalea argued for affirmance 1) because the earlier agreement had released the same claim; and 2) because the evidence was uncontradicted that Bramalea in fact had paid Hemmerle the money in question, in the form of a credit on another transaction (*id.* at 23-24). And on the contract claims concerning interest on some escrowed funds, Bramalea argued 1) that the earlier release was controlling; 2) that the claim was barred by the applicable statute of limitations; 3) that Mr. Hemmerle had offered no competent evidence upon which to compute the amount of interest allegedly owed; and 4) that having assigned away his interest in this claim, Mr. Hemmerle had no standing to bring it (*id.* at 26-28). As we have noted, the district court of appeal affirmed the judgment entered on the directed verdict without opinion (App. 61). Therefore, it is impossible to know which of these many alternative arguments the appellate court may have accepted.

II. The Attorneys' Fees. On the question of attorneys' fees in Case No. 88-1844, the relevant facts are the following. About a week before the trial, Bramalea sent a certified letter to Mr. Hemmerle which said the following: "Pursuant to the recently enacted Section 45.061 of Florida Statutes, this will constitute Bramalea's written Offer of Judgment in the amount of $75,000" (R. 2867). Mr. Hemmerle has quoted the statute at pages 2-5 of his petition. It subjects the losing party to attorneys' fees who has rejected an offer of settlement which was 25% or more higher (for the plaintiff) or 25% or more lower (for the defendant) than the amount actually awarded at trial.

On the day after the trial court's direction of a verdict for Bramalea on all counts, Bramalea filed its motion to tax costs, which mistakenly invoked another section of the Florida Statutes instead of § 45.061 (R. 2838-39). At a subsequent hearing, as Mr. Hemmerle has pointed out (Pet. 13), Bramalea orally moved to amend its motion to invoke § 45.061, and in granting the motion, as Mr. Hemmerle himself acknowledged subsequently (*see* Brief of Appellant at 2, Case No. 88-1844), the trial court granted Mr. Hemmerle an additional ten days in which to file a memorandum of law addressed to § 45.061. Mr. Hemmerle did file a legal memorandum addressing the statute, but the trial court nevertheless entered an award of attorneys' fees for Bramalea.

On appeal, the district court accepted Mr. Hemmerle's contention that § 45.061 "is substantive and that it may not be given retrospective application" (App. 74). Although the effective date of § 45.061 post-dated Mr. Hemmerle's complaint against Bramalea, however, the district court concluded that its application in this case

had not been retroactive. To the contrary, because Bramalea's offer of settlement and Mr. Hemmerle's rejection of that offer had both been made after the effective date of the statute, its application had not been retroactive (App. 74):

> What event triggers the remedy provided by the statute? We do not agree . . . that the triggering event is accrual of the cause of action. Neither do we think that it is the commencement of the litigation. Rather, the operative event, the only event crucial to operation of the statute, is the making of an offer of settlement. Only upon the making of an offer of settlement are the respective rights and duties of the parties aligned according to the requirements of the statute, and at that time both parties are free to respond or not to the policies embodied in the statutory scheme without reference to any earlier events. Since the offer of settlement in this case was made after the effective date of section 45.061, we find no impediment to application of the statute.

The appellate court also rejected Mr. Hemmerle's contention that the trial court had erred in permitting Bramalea to amend its motion to invoke the statute, because the initial error "was corrected in due course and appellant was not at all prejudiced by the original mistake" (App. 74).

In an amended motion for rehearing (App. 76), Mr. Hemmerle, for the first time, raised a constitutional argument which was directly inconsistent with his primary argument on appeal. The earlier (retroactivity) argument depended on the assumption that the statute is substantive in nature, and the appellate court had agreed with Mr. Hemmerle that the statute "is substantive . . . " (App.

74). Now, Mr. Hemmerle argued that the statute was procedural, and therefore violated the Florida courts' rulemaking authority (App. 76). Without explanation, the appellate court denied the motion (App. 79).

ARGUMENT

1. Mr. Hemmerle's Challenge to the State Court's Directed Verdict on His State-Law Claims Presents No Substantial Federal Question.

In light of the foregoing, Mr. Hemmerle's challenge to the directed verdict on his claims of fraud and breach of contract can only be described as frivolous. First, as Mr. Hemmerle has implicitly acknowledged (*see* Pet. 15-16), he raised no federal question in the trial court, and therefore has failed to preserve such a question for this Court's review.[1]

Second, Mr. Hemmerle has acknowledged (Pet. 15-16) that he raised a federal constitutional question for

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[1] Florida law requires that in the absence of fundamental error, all issues must be raised at the trial level to be preserved for appellate review. *See Dober v. Worrell*, 401 So.2d 1322 (Fla. 1981); *Castor v. State*, 365 So.2d 701 (Fla. 1978); *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977). That includes constitutional challenges. *See Clark v. State*, 363 So.2d 331 (Fla. 1978); *Smith v. Ervin*, 64 So.2d 166 (Fla. 1953); *Henderson v. Antonacci*, 62 So.2d 5 (Fla. 1952). Under this Court's decisions, Mr. Hemmerle's failure to satisfy the state's preservation requirement was fatal. *See Engle v. Isaac*, 456 U.S. 107, 124-35 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Parker v. North Carolina*, 397 U.S. 790, 798 (1970); *Edelman v. People of State of California*, 344 U.S. 357 (1953).

the first time in the state appellate court only in his motion for rehearing. Under Florida law, that was too late.[2] Under this Court's decisions, that too was fatal.[3]

Third, regardless of the state's practice, the general rule in this Court is that if the federal question was raised for the first time in a motion for rehearing in the state court, this Court will not consider it unless the state court expressly addressed the issue in adjudicating the motion for rehearing.[4] In the instant case, the motion was denied without explanation (App. 71).

Fourth and finally, even if the issue had properly been raised, it is not generally this Court's function to review the sufficiency of evidence, even on federal questions.[5] And although this Court has done so on

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[2] *See Devon-Aire Villas Homeowners Association, No. 4, Inc. v. Americable Associates, Ltd.*, 490 So.2d 60, 68 (Fla. 3d DCA 1985); *Sag Harbour Marine, Inc. v. Fickett*, 484 So.2d 1250, 1256 (Fla. 1st DCA), *review denied*, 494 So.2d 1150 (Fla. 1986); *Proulx v. County of Lee*, 466 So.2d 253 (Fla. 2d DCA), *review dismissed*, 472 So.2d 1182 (Fla. 1985); *Polyglycoat Corp. v. Hirsch Distributors, Inc.*, 442 So.2d 958 (Fla. 4th DCA), *review dismissed*, 451 So.2d 848 (Fla. 1984).

[3] *See Beck v. Washington*, 369 U.S. 541, 549-54 (1962); *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *Beaty v. Richardson*, 276 U.S. 599 (1928); *John v. Paullin*, 231 U.S. 583, 585 (1913).

[4] *See Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 326, 333-34 (1913); *Forbes v. State Council*, 216 U.S. 396, 399 (1910).

[5] *See United States v. Doe*, 465 U.S. 605 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Graver Tank & Manufacturing Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *United States v. Johnston*, 268 U.S. 220, 227 (1925).

occasion in considering important federal questions, we are aware of no decisions in which this Court has accepted jurisdiction solely to review the sufficiency of the evidence to support a judgment entered by a state court on an issue of state law. To the contrary, this Court has accepted review of state-court decisions only when they have passed upon the validity of federal statutes or treaties, or have held a state statute to be repugnant to the federal Constitution, or have created some important issue or conflict on an issue of federal law. *See generally* R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* 236-39 (6th ed. 1986) (and cases cited). In the light of the foregoing observations, the petitioner's first issue can only be described as frivolous.

2. The State Court's Enforcement of the State Statute Awarding Attorney's Fees Presents No Substantial Federal Question.

For similar reasons, the petitioner's second argument also presents no substantial federal question. First, as Mr. Hemmerle has admitted (Pet. 17), he raised no federal constitutional question at the trial level, and that was fatal. *See supra* n.1. Second, Mr. Hemmerle has advanced here no federal constitutional question which he raised at the appellate level either. Mr. Hemmerle did argue on appeal that the fee statute is substantive, and was impermissibly applied retroactively. But Mr. Hemmerle has not advanced that contention before this Court, and thus has waived it.[6] The one constitutional argument advanced

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[6] *See Mazer v. Stein*, 347 U.S. 201, 206 n.5 (1954); *Irvine v. People of California*, 347 U.S. 128, 129 (1954).

here (raised for the first time in an amended motion for rehearing in the appellate court, *see* Pet. 17) is that the Florida attorneys'-fee statute violated the separation between the judicial and legislative branches of Florida's government, under the Florida Constitution. Indeed, since we are concerned here with a Florida statute, no federal separation-of-powers argument could have been raised.

Third, even if Mr. Hemmerle had raised a federal constitutional question in his amended motion for rehearing, that was too late under Florida law, and therefore failed to preserve the issue under federal law. *See supra* nn.2, 3. Fourth, even apart from the requirements of Florida law, this Court's decisions have held that the invocation of a federal question for the first time in a motion for rehearing will preserve the issue only if the state court specifically addresses that question. *See supra* n.4. In the instant case, the Florida appellate court denied the motion and amended motion for rehearing without explanation (App. 79).

Fifth and finally, even if the issue had been preserved for this Court's review, it presents no substantial question. Mr. Hemmerle's argument on rehearing was that the attorneys'-fee statute is procedural in nature, and thus that its promulgation by the Florida Legislature infringed upon the Florida Supreme Court's procedural rulemaking authority. As we have noted, that belated contention was directly contrary to the central argument which Mr. Hemmerle had presented in his appellate brief – that the attorneys'-fee statute is substantive in nature, and that the trial court had impermissibly applied it retroactively. In its opinion, the Florida appellate court accepted the

premise of that argument: "We agree . . . that the statute is substantive and that it may not be given retrospective application" (App. 74); but held that because both the offer of judgment and its rejection had been made after the statute's effective date, its application was not retroactive at all (*id.*). Contrary to Mr. Hemmerle's suggestion (Pet. 24), the appellate court's characterization of the statute as substantive was endorsed by the Florida Supreme Court in *The Florida Bar; Re: Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment)*, 550 So.2d 442 (Fla. 1989). That decision invalidated only certain minor aspects of the statute (for example, some time requirements) as impermissibly procedural, while upholding the rest. Under Florida law, as the Florida Supreme Court and the appellate court in the instant case both correctly held, a statute imposing sanctions for the unreasonable rejection of a settlement offer unquestionably is substantive in nature, and thus is the proper subject of legislative action. As we have noted, that conclusion was made under the Florida Constitution, and thus implicates no federal question; but even if some federal question were implicated, the Florida court's decision unquestionably was correct.

For all of these reasons, on the attorneys'-fee question as well, the petitioner has presented no substantial federal question.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOEL S. PERWIN, ESQ.
Counsel of Record
PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN &
PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

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